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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF ARIZONA  
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12 José Parra, Gonzalo Estrada, )  
and Aurelia Martinez, )  
13 Plaintiffs, )  
14 vs. )  
15 Bashas', Inc. )  
16 Defendant. )  
17 \_\_\_\_\_ )

No. CIV-02-0591-PHX-RCB

**O R D E R**

18 **Introduction**

19 More than a decade ago, current and former Hispanic<sup>1</sup>  
20 employees of defendant Bashas', Inc. filed this action  
21 alleging race and national origin discrimination in violation  
22 of Title VII of the 1964 Civil Rights Act as amended ("Title  
23 VII"), 42 U.S.C. § 2000e, *et seq.*, for both disparate impact  
24 and disparate treatment, and intentional race discrimination  
25 in violation of 42 U.S.C. § 1981. Plaintiffs allege that  
26 \_\_\_\_\_

27 <sup>1</sup> Plaintiffs interchangeably refer to themselves as "Latino" or  
28 "Hispanic." For the sake of uniformity, and because plaintiffs primarily  
refer to themselves as Hispanics so too will this court.

1 Bashas' has discriminated against them with respect to pay  
2 and working conditions. In 2005, this court denied  
3 certification of a pay class, but granted certification as to  
4 the working conditions claim. Parra v. Bashas', Inc., 2005  
5 WL 6182338 (D. Ariz. 2005) ("Parra I"). In the ensuing  
6 years, for a host of reasons recounted below, this action has  
7 not moved beyond the class certification stage. Pending  
8 before the court is the most recent permutation of the class  
9 certification issue.

### 10 Background

11 Bashas' Inc. operates three grocery store chains with  
12 three different formats and monikers: A.J.'s Fine Foods  
13 ("A.J.'s"); (2) Bashas'; and (3) Food City. In this putative  
14 class action, named plaintiffs Gonzalo Estrada,<sup>2</sup> a Hispanic  
15 former Food City hourly employee, and Aurelia Martinez, a  
16 Hispanic current Food City hourly employee,<sup>3</sup> allege that  
17 Bashas' pays its "predominantly" Hispanic Food City  
18 employees, less than it pays "the Caucasian employees at  
19 A.J.'s Fine Foods and Bashas' for performing the same work."  
20 First Amended Complaint ("FAC") (Doc. 116) at 1:26-2:2, ¶ 1  
21 ("the pay claim"). Plaintiffs further allege that the Food  
22 City Hispanic employees "are required to work under

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24 <sup>2</sup> As part of their motion for class certification, plaintiffs have  
25 submitted numerous declarations from current and former Hispanic hourly  
26 Food City employees. José Agapito Perez Estrada provided one such  
27 declaration. To clarify, all references herein to Estrada are to the named  
28 plaintiff, Gonzalo Estrada.

27 <sup>3</sup> Originally, José Parra also was a named plaintiff, but he has  
28 since withdrawn, although he remains a member of the putative class. See  
Parra I, 2005 WL 6182338, at \*17 n. 31.

1 conditions that are typically less safe and less hygienic  
2 than the conditions found at A.J.'s . . . and Bashas'." Id.  
3 at 2:2-4, ¶ 1 ("the working conditions claim").

4 In Parra I, this court granted plaintiffs' motion for  
5 class certification pursuant to Fed.R.Civ.P. 23(b)(2) as to  
6 the working conditions claim, but denied certification of the  
7 pay claim, because there was not "sufficient commonality  
8 among the class members" as to the latter claim. Parra I,  
9 2005 WL 6182338, at \*16. Commonality, as Rule 23(a)(2)  
10 requires for all class actions, was lacking because, as the  
11 parties conceded, "the contested pay scales ha[d] merged and,  
12 for the most part, are now identical." Id. at \*15 (citations  
13 omitted).

14 On appeal, the Ninth Circuit faulted this court for  
15 "only look[ing] at the current pay scales." Parra v.  
16 Bashas', Inc., 536 F.3d 975, 979 (9<sup>th</sup> Cir. 2008) ("Parra II"),  
17 *cert. denied*, Bashas', Inc. v. Parra, 555 U.S. 1154, 129  
18 S.Ct. 1050, 173 L.Ed.2d 470 (2009). This court also should  
19 have "consider[ed] the evidence of past pay disparities and  
20 discrimination common to the Hispanic workers at Food City."  
21 Id. Taking that evidence into account, the Court found that  
22 the "pay scales were common for all Bashas', Inc. employees  
23 and provided for different pay for similar jobs based only on  
24 where the employee worked." Id. Additionally, the Ninth  
25 Circuit pointed out that "[t]he class definition seeks to  
26 reach those Hispanic employees who suffered *past*  
27 discrimination under th[o]se pay scales." Id. (emphasis  
28 added). Given plaintiffs' "extensive evidence showing

1 Bashas', Inc.'s discriminatory pay practices commonly  
2 affected all members of the proposed class[,]” the Ninth  
3 Circuit reversed this court’s commonality finding and  
4 remanded, instructing it to “consider[] . . . the remaining  
5 class certification factors[.]” Id. at 979-980.

6       Thereafter, the issue of class certification as to the  
7 pay claim was in a state of legal limbo for quite a while.  
8 Bashas’ filing of a voluntary Chapter 11 bankruptcy petition  
9 resulting in an automatic statutory stay, heavily contributed  
10 to that state, as did this court’s decision to “defer  
11 resolution of the class certification issue pending a  
12 decision” in Wal-Mart Stores, Inc. v. Dukes, 603 F.3d 571  
13 (9<sup>th</sup> Cir. 2010) (“Dukes II”) (*en banc*), *cert. granted*, ---  
14 U.S. ---, 131 S.Ct. 795, 178 L.Ed.2d 530 (2010). Ord. (Doc.  
15 295) at 2:14-15 (citation omitted). This court opted for  
16 deferral “rather than deciding the case in haste without the  
17 benefit of the Supreme Court’s decision in Dukes[.]” Id. at  
18 2:13-14.

19       Nearly three years after Parra II, the Supreme Court  
20 rendered its decision in Wal-Mart Stores, Inc. v. Dukes, 564  
21 U.S. \_\_\_, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (“Dukes”).  
22 Vacating certification of a class estimated to include 1.5  
23 million female current or former Wal-Mart employees, the  
24 Supreme Court held, *inter alia*, that plaintiffs did “not  
25 establish[] the existence of any common question[,]” as Rule  
26 23(a)(2) requires. Id. at 2557 (footnote omitted). In  
27 accordance with this court’s order, the parties then  
28 simultaneously filed supplemental briefs and replies with

1 respect to the potential impact of Dukes upon the present  
2 case. After considering all of the submissions filed with  
3 respect to plaintiffs' 2004 motion for class certification,<sup>4</sup>  
4 their positions during oral argument thereon, and the  
5 parties' supplemental Dukes briefs, replies and other  
6 filings, the court finds as follows.

### 7 Discussion

8 Originally, plaintiffs sought class certification  
9 pursuant to Fed.R.Civ.P. 23(b)(2) as to both the pay and the  
10 working conditions claims; and in Parra I, this court  
11 confined its analysis accordingly. Now, however, in light of  
12 Dukes, the plaintiffs are seeking certification of the pay  
13 claim pursuant to Fed.R.Civ.P. 23(b)(3). Furthermore, also  
14 in light of Dukes, Bashas' is requesting that this court  
15 reconsider its decision certifying the working conditions  
16 claim, and decertify that claim. The court will address the  
17 myriad of issues surrounding class certification as to each  
18 of these two claims separately, beginning with the pay claim.  
19 But first, the court will outline the legal framework for its  
20 analysis.

#### 21 I. Class Certification Legal Framework

22 Rule 23 "give[s] the district court broad discretion  
23 over certification of class actions[.]" Stearns v.  
24 Ticketmaster Corp., 655 F.3d 1013, 1019 (9<sup>th</sup> Cir. 2011).

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25 <sup>4</sup> In 2004, the class certification motion, the response, the reply  
26 and some supporting documentation were all filed under seal. Given "the  
27 extreme passage of time[,]" as Bashas' notes, "much of the information no  
28 longer is sensitive." Defs.' Supp. Br. (Doc. 301) at 2:25, n. 1. Thus, to  
the extent the parties have relied upon any sealed documents, so, too has  
the court.

1 However, class certification remains “an exception to the  
 2 usual rule that litigation is conducted by and on behalf of  
 3 the individual named parties only.” Comcast Corp. v.  
 4 Behrend, --- U.S. ----, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515  
 5 (2013) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-701,  
 6 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). “[T]o justify a  
 7 departure from that rule, a class representative must be part  
 8 of the class and possess the same interest and suffer the  
 9 same injury as the class members.” Dukes, 131 S.Ct. at 2550  
 10 (internal quotation marks and citations omitted).

11 The Dukes Court made clear that “Rule 23 does not set  
 12 forth a mere pleading standard.” Dukes, 131 S.Ct. at 2551.  
 13 Therefore, “a party seeking to maintain a class action ‘must  
 14 affirmatively demonstrate . . . compliance’ with Rule 23.”  
 15 Comcast, 133 S.Ct. at 1432 (quoting Dukes, 131 S.Ct. at 2551-  
 16 2552). That means, “a party must . . . ‘be prepared to prove  
 17 that there are *in fact* sufficiently numerous parties, common  
 18 questions of law or fact,’ typicality of claims or defenses,  
 19 and adequacy of representation, as required by Rule 23(a).”<sup>5</sup>

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 21 <sup>5</sup> “The Supreme Court . . . has yet to decisively attach a standard  
 22 of proof to Rule 23 requirements[,]” Keegan v. American Honda Motor Co.,  
 23 284 F.R.D. 504, 521 n. 83 (C.D.Cal. 2012) (internal quotation marks and  
 24 citation omitted), even after its two most recent class action decisions,  
 25 Amgen Inc. v. Conn. Ret. Plans and Trust Funds, --- U.S. ----, 133 S.Ct.  
 26 1184, 185 L.Ed.2d 308 (2013), and Comcast. Similarly, the Ninth Circuit  
 27 has not yet been squarely confronted with this burden of proof issue.  
 28 Among the Circuit Courts to have addressed the issue, a consensus is  
 emerging around the “preponderance of the evidence” standard. See, e.g.,  
Levitt v. J.P. Morgan Securities, Inc., 710 F.3d 454, 465 (2<sup>nd</sup> Cir. 2013)  
 (internal quotation marks and citation omitted) (emphasis added) (“The Rule  
 23 requirements must be established by at least a preponderance of the  
 evidence.”); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811  
 (7<sup>th</sup> Cir. 2012) (citations omitted) (“Plaintiffs bear the burden of showing  
 that a proposed class satisfies the Rule 23 requirements, . . . , but they  
 need not make that showing to a degree of absolute certainty. It is

1 Id. (quoting Dukes, 131 S.Ct. at 2551) (emphasis in  
 2 original). Satisfying those prerequisites, "effectively  
 3 limit[s] . . . class claims to those fairly encompassed by  
 4 the named plaintiff's claims." Dukes, 131 S.Ct. at 2550  
 5 (internal quotation marks and citations omitted).

6 When analyzing the propriety of class certification, the  
 7 Supreme Court has "[r]epeatedly . . . emphasized that it  
 8 'may be necessary for the court to probe behind the  
 9 pleadings before coming to rest on the certification  
 10 question,' and certification is proper only if 'the trial  
 11 court is satisfied, after a rigorous analysis, that the  
 12 prerequisites of Rule 23(a) have been satisfied.'" Comcast,  
 13 133 S.Ct. at 1432 (quoting Dukes, 131 S.Ct. at 2551) (quoting  
 14 in turn General Telephone Co. of Southwest v. Falcon, 457  
 15 U.S. 147, 160-161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).  
 16 The exact contours of a "rigorous analysis," as well as the  
 17 extent to which courts may "probe behind the pleadings[,] is  
 18 still evolving. What is certain though is that a rigorous  
 19 analysis "will frequently entail 'overlap with the merits of  
 20 the plaintiff's underlying claim.'" Id. (quoting Dukes, 564

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 22 sufficient if each disputed requirement has been proven by a preponderance  
 23 of evidence."); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320  
 24 (3d Cir. 2008) ("a district court exercising proper discretion in deciding  
 25 whether to certify a class will resolve factual disputes by a preponderance  
 26 of the evidence and make findings that each Rule 23 requirement is met or  
 27 is not met[>"). However, that view is not universally held. See Gooch v.  
 28 Life Investors, Co. of Am., 672 F.3d 402, 418 n. 8 (declining  
 "preponderance of the evidence" standard for the "rigorous analysis"  
 mandated by Dukes and Falcon).

Absent specific guidance from the Supreme Court or the Ninth Circuit,  
 the court, "see[s] no reason to superimpose a more specific standard than  
 the Supreme Court[.]" See Gooch, 672 F.3d at 418 n. 8. This is especially  
 so because "factual issues are not in play[]" in that Bashas' concessions  
 provide the primary factual basis, at least with respect to plaintiffs' pay  
 claim. See id.

1 U.S. at ----, 133 S.Ct. at 2551). "That is so because the  
2 'class determination generally involves considerations that  
3 are enmeshed in the factual and legal issues comprising the  
4 plaintiff's cause of action.'" Id. (quoting Dukes, 564 U.S.,  
5 at ----, 131 S.Ct. at 2551) (other quotation marks and  
6 citation omitted).

7 Post-Dukes, the Ninth Circuit has stressed that "a  
8 district court *must* consider the merits if they overlap with  
9 the Rule 23(a) requirements." Ellis v. Costco Wholesale  
10 Corp., 657 F.3d 970, 981 (9<sup>th</sup> Cir. 2011) ("Ellis I") (emphasis  
11 in original) (citations omitted). Indeed, the Supreme Court  
12 has recently cautioned that "Rule 23 grants no license to  
13 engage in free-ranging merits inquiries at the certification  
14 stage. Merits questions may be considered to the extent - but  
15 only to the extent - that they are relevant to determining  
16 whether the Rule 23 prerequisites for class certification are  
17 satisfied." Amgen, 133 S.Ct. at 1194-95; see also Comcast,  
18 133 S.Ct. 1426. "To hold otherwise would turn class  
19 certification into a mini-trial." Ellis I, 657 F.3d at 983  
20 n. 8. This court thus will "not turn the[s]e class  
21 certification proceedings into a dress rehearsal for the  
22 trial on the merits." See Messner v. Northshore University  
23 HealthSystem, 669 F.3d 802, 811 (7<sup>th</sup> Cir. 2012) (citations  
24 omitted).

25 That said, neither "the possibility that a plaintiff  
26 will be unable to prove his allegations, nor the possibility  
27 that the later course of the suit might unforeseeably prove  
28 the original decision to certify the class wrong, is a basis



1 for declining to certify a class which apparently satisfies  
2 [Rule 23]." United Steel, Paper & Forestry, Rubber,  
3 Manufacturing Energy, Allied Industrial & Service Workers  
4 International Union v. ConocoPhillips Co., 593 F.3d 802, 809  
5 (9<sup>th</sup> Cir. 2010). "[A]ctual, not presumed, conformance with  
6 Rule 23(a) remains . . . indispensable." Falcon, 457 U.S. at  
7 161. Consequently, "a court is not required to  
8 "unquestioningly accept a plaintiff's arguments as to the  
9 necessary Rule 23 determinations." Gonzales v. Comcast  
10 Corp., 2012 WL 10621, at \*9 (E.D.Cal. Jan. 3, 2012) (internal  
11 quotation marks and citation omitted), adopted in full, 2012  
12 WL 217708 (E.D.Cal. Jan. 23, 2012).

13       Once all four prerequisites of Rule 23(a) are shown,  
14 "the party must also satisfy through evidentiary proof at  
15 least one of the provisions of Rule 23(b)." Comcast, 133  
16 S.Ct. at 1432. In the present case, the provision at issue  
17 is subsection three, which requires a court to find that "the  
18 questions of law or fact common to class members predominate  
19 over any questions affecting only individual members."  
20 Fed.R.Civ.P. 23(b)(3). Leaving no doubt, the Comcast Court  
21 expressly held that "[t]he same analytical principles[,] "  
22 outlined above, requiring a rigorous analysis and "frequently  
23 entail[ing] some overlap with the merits[,] . . . govern Rule  
24 23(b)." Comcast, 133 S.Ct. at 1432 (citation omitted).  
25 These principles form the backdrop for the pending issue of  
26 whether to certify a class as to plaintiffs' pay claim, and  
27 also whether to decertify the class as to their working  
28 conditions claim.

1 II. Pay Claim

2 A. Fed.R.Civ.P. 23(a)

3 1. Numerosity

4 Numerosity, the first prerequisite for class  
5 certification under Rule 23(a), is shown when "the class is  
6 so numerous that joinder of all members is impracticable."  
7 Fed.R.Civ.P. 23(a)(1). In Parra I, Bashas' did not contest  
8 certification based upon a lack of numerosity, and the  
9 putative class has "thousands of members[.]" See Parra I,  
10 2005 WL 6182338, at \*14 (citations omitted). The plaintiffs  
11 thus have readily shown numerosity. Further, because Bashas'  
12 did not contest numerosity on appeal, nor does Bashas' raise  
13 that issue now, the court adheres to that earlier finding.  
14 Consequently, the court is free to turn to the vigorously  
15 disputed issue of whether, in the wake of Dukes, plaintiffs  
16 have met their burden of showing commonality as to their pay  
17 claim.

18 2. Commonality

19 The second requirement under Rule 23(a) is the existence  
20 of "questions of law or fact common to the class[.]"  
21 Fed.R.Civ.P. 23(a)(2). Commonality under that Rule was  
22 "[t]he crux" of Dukes, 131 S.Ct. at 2550. In the present  
23 case, the parties strenuously disagree as to the  
24 applicability of Dukes, especially given the procedural  
25 posture of this case -- on remand after a finding of  
26 commonality. From Bashas' perspective, Dukes "substantially  
27 restated the standard for establishing commonality[.]" Def.'s  
28 Resp. (Doc. 304) at 5:20, n. 1 (citations omitted). Strongly

1 implying that because Dukes constitutes an intervening change  
2 in law, Bashas' further argues that "[n]either the law of the  
3 case doctrine nor the mandate rule" require this court to  
4 abide by the Ninth Circuit's finding of commonality in Parra  
5 II. Id. at 5:19, n. 1. Hence, Bashas' believes that after  
6 Dukes "it is not only proper but necessary [for this court]  
7 to revisit Plaintiffs' ability to show commonality." Id. at  
8 5:23, n. 1.

9 To the contrary, plaintiffs argue that the Ninth  
10 Circuit's finding of commonality in Parra II "is unaffected"  
11 by Dukes. Pls.' Supp. Br. (Doc. 302) at 16:11. Therefore,  
12 plaintiffs assert that Bashas' is "effect[ively] . . .  
13 urg[ing] this Court to ignore the mandate of the Ninth  
14 Circuit." Pls.' Reply (Doc. 303) at 6:5-6 (citation  
15 omitted). Skirting the critical issue of whether Dukes  
16 amounts to a change in controlling law, plaintiffs first  
17 observe that the Parra II Court "did not rely on any of the  
18 Ninth Circuit's rulings in *Wal-Mart*, now reversed by the  
19 Supreme Court["] in Dukes. Id. at 16:12-13. While obviously  
20 true,<sup>6</sup> it does not necessarily follow that because of that  
21 Dukes is not an intervening change in law, as plaintiffs  
22 suggest.

23 Plaintiffs add that Dukes and the present case "raise  
24 different commonality issues." Id. at 16:14. Assuming that  
25 is so, it also does not necessarily follow therefrom that  
26 Dukes does not constitute an intervening change in law. Put

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27  
28 <sup>6</sup> Given that Parra II was decided in 2008, it would have been impossible for that Court to have relied upon the Ninth Circuit's 2010 Dukes decision.

1 differently, it is possible that Dukes is an intervening  
2 change in law, regardless of the nature of the commonality  
3 issues. Plaintiffs' final response is that "the policy issue  
4 in this case is precisely the kind of 'specific employment  
5 practice' found lacking by the Supreme Court in [Dukes]." Id.  
6 at 16:19-21. Still, this is not directly responsive to  
7 the change in law issue.

8 **a. Law of the Case/Rule of Mandate**

9 It is well settled in this Circuit that "[w]hen a case  
10 has been decided by an appellate court and remanded, the  
11 court to which it is remanded must proceed in accordance with  
12 the mandate and such law of the case as was established by  
13 the appellate court.'" United States v. Luong, 627 F.3d 1305,  
14 1309 (9<sup>th</sup> Cir. 2010) (quoting Firth v. United States, 554 F.2d  
15 990, 993 (9<sup>th</sup> Cir. 1977)). Pursuant to the law of the case, "a  
16 court will generally refuse to reconsider an issue that has  
17 already been decided by the same court or a higher court in  
18 the same case." Gonzalez v. Arizona, 677 F.3d 383, 389 n. 4  
19 (9<sup>th</sup> Cir. 2012) (citation omitted) (en banc), cert. granted, -  
20 -- U.S. ----, 133 S.Ct. 476, 184 L.Ed.2d 296 (2012). The  
21 law of the case doctrine applies when, *inter alia*, "the issue  
22 in question [was] decided explicitly . . . in the previous  
23 disposition." United States v. Thrasher, 483 F.3d 977, 981  
24 (9<sup>th</sup> Cir. 2007). Plainly, "the issue in question" here -  
25 whether plaintiffs met Rule 23(a)(2)'s commonality standard -  
26 was explicitly decided in Parra II. Thus, prior to Dukes,  
27 the Ninth Circuit's finding of commonality in Parra II would  
28 have been binding upon this court, and the law of the case

1 doctrine would have barred reconsideration of that issue on  
2 remand.

3 The same result holds true with respect to the rule of  
4 mandate, which "is similar to, but broader than, the law of  
5 the case doctrine." See id. at 982 (internal quotation marks  
6 and citation omitted). "The Supreme Court long ago  
7 emphasized that when acting under an appellate court's  
8 mandate, an inferior court 'cannot vary it, or examine it for  
9 any other purpose than execution; or give any other or  
10 further relief; or review it, even for apparent error, upon  
11 any matter decided upon appeal; or intermeddle with it,  
12 further than to settle so much as has been remanded.'" Matter of Beverly Hills Bancorp, 752 F.2d 1334, 1337 (9<sup>th</sup> Cir.  
13 1984) (quoting In re Sanford Fork & Tool Co., 160 U.S. 247,  
14 255, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895)). Prior to  
15 Dukes, the rule of mandate would have deprived this court of  
16 jurisdiction to revisit on remand the Parra II commonality  
17 finding. See Luong, 627 F.3d at 1309 (internal quotation  
18 marks and citation omitted) ("[I]f a district court errs by  
19 violating the rule of mandate, the error is a jurisdictional  
20 one[.]") That is so because in reversing this court's  
21 "finding that Plaintiffs' originally proposed class lacked  
22 commonality under Rule 23(a)(2)," the Ninth Circuit  
23 explicitly remanded "for consideration of the *remaining* class  
24 certification factors in accordance with [its] opinion."  
25 Parra II, 536 F.3d at 980 (emphasis added).  
26

27 Importantly, there is some flexibility with respect to  
28 the rule of mandate and law of the case doctrines. Indeed,

1 Ninth Circuit "cases make clear that the rule of mandate is  
2 designed to permit flexibility where necessary, *not* to  
3 prohibit it." U.S. v. Kellington, 217 F.3d 1084, 1095 n. 12  
4 (9<sup>th</sup> Cir. 2000) (emphasis added). The Ninth Circuit likewise  
5 has recognized that the "[l]aw of the case should not be  
6 applied woodenly in a way inconsistent with substantial  
7 justice." United States v. Miller, 822 F.2d 828, 832-33 (9<sup>th</sup>  
8 Cir. 1987); see also Yankee Atomic Electric Co. v. United  
9 States, 679 F.3d 1354, 1360 (Fed. Cir. 2012) (internal  
10 quotation marks and citations omitted) ("An appellate mandate  
11 does not turn a district judge into a robot, mechanically  
12 carrying out orders that become inappropriate in light of  
13 subsequent factual discoveries or changes in the law.")

14       Given that inherent flexibility, there are exceptions  
15 warranting a departure from the law of the case and rule of  
16 mandate doctrines. Among other reasons, a court has  
17 discretion to depart from the law of the case doctrine based  
18 upon "intervening controlling authority [which] makes  
19 reconsideration appropriate[.]" United States v. Jingles,  
20 682 F.3d 811, 820 (9<sup>th</sup> Cir. 2012) (internal quotation marks  
21 and citations omitted). Further, because "[t]he mandate rule  
22 is a subpart of the law of the case doctrine[,]" . . . the  
23 mandate rule is subject to the same exceptions[]" as the law  
24 of the case doctrine. American Express Travel Related Serv.  
25 Co. v. Fraschilla (In re Fraschilla), 235 B.R. 449, 457 (9<sup>th</sup>  
26 Cir. BAP 1999), aff'd, 242 F.3d 381 (9<sup>th</sup> Cir. 2000) (citing  
27 Miller, 822 F.2d at 832). Hence, because the "Ninth Circuit  
28 has identified . . . an intervening change in the law" as one

1 of several "circumstances in which the law of the case  
2 doctrine," need not be applied, "by analogy the rule of  
3 mandate doctrine[] [also] need not be applied[]" when there  
4 has been such a change in the law. See Allen v. Astrue,  
5 2010 WL 4825925, at \*5 (C.D.Cal. 2010) (emphasis added)  
6 (citing cases).

7 In the present case, the issue thus becomes whether, as  
8 Bashas' contends, Dukes constitutes an intervening change in  
9 the controlling law so as to permit departure from the rule  
10 of mandate and law of the case doctrines. See Fraschilla,  
11 235 B.R. at 455 (citing cases) ("[T]rial courts are permitted  
12 on remand to consider whether any exceptions to the law of  
13 the case doctrine excuse compliance with a determination made  
14 by an appellate court.") In its first application of Dukes,  
15 the Ninth Circuit sweepingly declared it to be "new precedent  
16 altering existing case law[,] requiring remand to the  
17 district court. Ellis I, 657 F.3d at 974. The Ninth Circuit  
18 in Ellis vacated and remanded a grant of class certification  
19 in a Title VII action alleging gender discrimination by the  
20 defendant employer in its promotion and management practices.  
21 Admittedly, the Ellis I Court was not faced with the precise  
22 issue before this court: whether Dukes is a change in  
23 controlling law so as to permit deviating from the law of the  
24 case and rule of mandate doctrines. Nonetheless, the Ninth  
25 Circuit's broad declaration in Ellis I is a strong signal  
26 that it views Dukes as changing the legal landscape with  
27 respect to class certification.

28 Reinforcing this view is the Ninth Circuit's more recent

1 decision in Wang v. Chinese Daily News, Inc., 709 F.3d 829  
2 (9<sup>th</sup> Cir. 2013). There, the plaintiffs argued that the  
3 defendant had "waived its right to challenge the district  
4 court's commonality finding because its opening brief, filed  
5 before . . . *Wal-Mart*, discussed the existence of common  
6 questions only in arguing against Rule 23(b)(3)  
7 certification." Id. at 833. The defendant "did not argue  
8 the issue of commonality in its discussion of Rule 23(a)."  
9 Id. "Generally, an issue is waived when the appellant does  
10 not specifically and distinctly argue the issue in his or her  
11 opening brief." Id. (internal quotation marks and citation  
12 omitted). However, invoking the settled rule that an  
13 appellate court "may consider new arguments . . . if the  
14 issue arises because of an intervening change in law[,] " the  
15 Ninth Circuit "conclude[d] that the [Supreme] Court's  
16 decision in *Wal-Mart* present[ed] a sufficiently significant  
17 legal development to excuse any failure of [the defendant] to  
18 discuss the commonality requirement of Rule 23(a)(2) in its  
19 opening brief." Id.

20 The Ninth Circuit is not alone in its view that Wal-Mart  
21 is "new precedent altering existing case law[,] " Ellis I, 657  
22 F.3d at 974, or a "significant legal development[.]" See  
23 Wang, 709 F.3d at 833. Other courts, including district  
24 courts within this Circuit, have variously recognized that  
25 Dukes: (1) sets forth a "heightened standard of  
26 commonality[;]"<sup>7</sup> (2) "represents a significant restatement of

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27  
28 <sup>7</sup> See Morrison v. Anadarko Petroleum Corp., 280 F.R.D. 621  
(W.D.Okla. 2012) (refusing to give preclusive effect to a state court class  
certification order because that court "did not apply the heightened



the commonality requirement[;]"<sup>8</sup> (3) clarifies the Rule 23(a) commonality element;<sup>9</sup> and (4) "undoubtedly increas[es] the burden on class representatives by requiring that they identify how common points of facts and law will drive or resolve the litigation[.]"<sup>10</sup> Partially based upon this weight of authority, the court is convinced that Dukes represents an intervening change in law.

Additionally, an independent examination of Dukes further convinces this court that the Supreme Court altered the legal standards for assessing commonality by, among other things, adding an additional level of scrutiny under Rule 23(a)(2). More specifically, Dukes adopted the view that "[w]hat matters to class certification . . . is not the

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standard of commonality as set forth in Dukes["]).

<sup>8</sup> Walter v. Hughes Communications, Inc., 2011 WL 2650711, at \*7 (N.D.Cal. 2011).

<sup>9</sup> See, e.g., Ellis I, 657 F.3d at 974 ("Several of the[] issues [“relating to class certification[]”] have recently been clarified by Dukes); Ross v. RBS Citizens, N.A., 667 F.3d 900, 902 (7<sup>th</sup> Cir. 2012) ("[T]he Supreme Court clarified the Rule 23(a) commonality element in" Dukes); Sanchez v. Sephora USA, Inc., 2012 WL 2945753, at \*3 (N.D.Cal. 2012) (same); In re Wells Fargo Residential Mortg. Lending Discrimination Litigation, 2011 WL 3903117, at \*2 (N.D.Cal. 2011) (same).

This court is keenly aware that in attempting to define what constitutes an intervening change in controlling law, it has previously found that "cases which merely confirm, clarify or explain existing case law" do not amount to such a change. Teamsters Local 617 Pension and Welfare Funds v. Apollo Group, Inc., 282 F.R.S. 216, 224 (D.Ariz. 2012). Significantly, however, in Apollo Group this court was examining what constitutes an intervening controlling law for purposes of determining whether to alter or amend a judgment under Rule 59(e), and it limited its finding accordingly. The interests of finality and conservation, which are of paramount importance in that context, Carroll v. Nakatani, 342 F.3d 934, 945 (9<sup>th</sup> Cir. 2003), are not implicated here. Moreover, as can be seen, clarification is just one of many ways in which courts have described Dukes' influence on Rule 23(a)(2)'s commonality standard.

<sup>10</sup> Gonzales, 2012 WL 10621, at \*10 (citation omitted) (emphasis in original).

1 raising of common 'questions' – even in droves – but, rather  
 2 the capacity of a classwide proceeding to generate common  
 3 answers apt to drive the resolution of the litigation."  
 4 Dukes, 131 S.Ct. at 2551 (internal quotation marks and  
 5 citation omitted) (emphasis in original). Consequently, in  
 6 its discretion, and given "the contours of the situation and  
 7 common sense[,] " this court finds it appropriate to revisit  
 8 the commonality issue, notwithstanding the Ninth Circuit's  
 9 resolution of that issue in Parra II.<sup>11</sup>

10 Hegler v. Borg, 50 F.3d 1472 (9<sup>th</sup> Cir. 1995) ("Hegler  
 11 II"), is closely analogous, and provides additional support  
 12 for reexamining the commonality issue in light of Dukes.  
 13 Reversing and remanding, in Hegler v. Borg, 990 F.2d 1258 (9<sup>th</sup>  
 14 Cir. 1993), the Ninth Circuit instructed the district court  
 15 to determine whether a particular error was harmless beyond a  
 16 reasonable doubt. On remand, the district court "disobeyed  
 17 the instruction in the mandate because an intervening Supreme

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18 <sup>11</sup> To a certain extent, the court finds itself in the position, so  
 19 aptly described by the Fraschilla court:

20 In effect, when there has been an intervening  
 21 authoritative decision of a higher appellate court  
 22 [i.e., Dukes] to which both the lower appellate court  
 23 that issued the mandate [i.e., Parra III] and th[is]  
 24 trial court owe obedience, then the trial court is  
 25 presented with the dilemma of a clash between the  
 26 dictates of the doctrine of *stare decisis* and the  
 imperative of the mandate rule. The correct choice  
 depends upon the contours of the situation and common  
 sense. It is no more comfortable for the trial court than  
 it is for the private soldier who receives contradictory  
 orders from the sergeant and the captain or the employee  
 caught between a middle manager and a top executive.

27 Fraschilla, 235 B.R. at 458.

1 Court decision prescribed a different standard." Fraschilla,  
2 235 B.R. at 458. In Hegler II, another Ninth Circuit panel  
3 agreed that it "must apply intervening Supreme Court  
4 authority to a subsequent appeal[]" as an exception to the  
5 law of the case doctrine. Hegler II, 50 F.3d at 1478.  
6 Therefore, the Hegler II Court "had no difficulty affirming  
7 the [district] court[]" despite that court's disregard of the  
8 mandate and the law of the case. See Fraschilla, 235 B.R. at  
9 458 (citation and footnote omitted).

10 Southern Oregon Barter Fair v. Jackson County, 372 F.3d  
11 1128 (9<sup>th</sup> Cir. 2004), and Fraschilla, 235 B.R. 449, are also  
12 instructive as to when a district court may depart from the  
13 mandate and law of the case. In Barter Fair, the Court held  
14 that it was not an abuse of discretion to re-examine the  
15 merits after the issuance of a preliminary injunction,  
16 notwithstanding the law of the case, because an intervening  
17 Supreme Court decision "provided important guidance" therein.  
18 Barter Fair, 372 F.3d at 1136.

19 Similarly, in Fraschilla, 235 B.R. 449, the Bankruptcy  
20 Appellate Panel ("BAP") held that although its mandate had  
21 directed entry of judgment in plaintiff's favor, the trial  
22 court did not err by subsequently conducting a trial where,  
23 following remand, there had been two intervening Ninth  
24 Circuit decisions. One such decision "amplified the  
25 importance of the other elements of [nondischargeability for]  
26 common law fraud." Id. at 456. The second intervening  
27 decision, while "somewhat opaque," "adjusted the focus" for a  
28 finding of nondischargeability, "emphasiz[ing] the need to

1 make an actual finding regarding intent[.]” Id. Those two  
2 decisions change[d] the landscape regarding credit card  
3 nondischargeability actions . . . alter[ing] the analysis  
4 that was applicable when the BAP decided the initial  
5 appeal[.]” therein. Id. at 455. As Barter Fair and  
6 Fraschilla demonstrate, even if an intervening decision does  
7 not go so far as to “prescribe a different standard,”  
8 nonetheless, such a decision can warrant a departure from the  
9 rule of mandate and law of the case doctrines. See  
10 Fraschilla, 235 B.R. at 458.

11 Ultimately, as plaintiffs assert, the Parra II Court’s  
12 finding of commonality (as distinguished from its rationale)  
13 might be “unaffected.” Pls.’ Supp. Br. (Doc. 302) at 6:13  
14 (citation omitted). It also may be, as plaintiffs assert,  
15 that Dukes “does not require a re-examination of [prior]  
16 *factual* findings[.] in this case. See Pls.’ Reply (Doc. 303)  
17 at 6:8-9 (emphasis added). Nevertheless, this court cannot  
18 disregard Dukes, which altered the legal standards for  
19 assessing Rule 23(a)(2) commonality.

20 **b. Dukes**

21 The Dukes plaintiffs alleged “that the discretion  
22 exercised by their local supervisors over pay and promotions  
23 matters violate[d] Title VII by discriminating against  
24 women.” Dukes, 131 S.Ct. at 2547. The Dukes plaintiffs  
25 attempted to demonstrate the common issue of company-wide  
26 gender discrimination chiefly through three different “forms  
27 of proof[.]” Dukes, 131 S.Ct. at 2549. First, the plaintiffs  
28 relied upon “statistical evidence about pay and promotion

1 disparities between men and women at the company[.]” Id.  
2 Second, they relied upon “anecdotal reports of discrimination  
3 from about 120 of Wal-Mart’s female employees[.]” Id.  
4 Third, the plaintiffs relied upon “the testimony of a  
5 sociologist, . . . , who conducted a ‘social framework  
6 analysis’ of Wal-Mart’s ‘culture’ and personnel practices,  
7 and concluded that the company was ‘vulnerable’ to gender  
8 discrimination.” Id. (citation omitted). In dismantling the  
9 nation-wide class, a five justice majority in Dukes held that  
10 plaintiffs did not show commonality because they did not  
11 “provide . . . convincing proof of a companywide  
12 discriminatory pay and promotion policy[,]” and hence they  
13 did “not establish[] the existence of any common question[,]”  
14 as Rule 23(a)(2) mandates. Id. at 2556-57.

15 Summarizing the commonality requirement, Justice Scalia  
16 wrote, that it “requires the plaintiff to demonstrate that  
17 the class members ‘have suffered the same injury[,]’” not  
18 “merely that they have all suffered a violation of the same  
19 provision of law.” Id. at 2551 (quoting Falcon, 457 U.S. at  
20 157, 102 S.Ct. 2364). To show that they have suffered the  
21 same injury, plaintiffs’ “claims must depend upon a common  
22 contention,” according to the Dukes Court. Id. That common  
23 contention, in turn, “must be of such a nature that it is  
24 capable of classwide resolution - which means that  
25 determination of its truth or falsity will resolve an issue  
26 that is central to the validity of each [claim] in one  
27 stroke.” Id. Such a common contention was missing in Dukes  
28 because there was not “some glue holding the alleged reasons

1 for all [of] those [individual employment] decisions  
2 together[.]” Id. at 2552 (emphasis in original). Therefore,  
3 it would “be impossible to say that examination of all the  
4 class members’ claims for relief will produce a common answer  
5 to the crucial question *why was I disfavored.*” Id. (emphasis  
6 in original).

7 Rejecting plaintiffs’ statistical evidence, the Dukes  
8 Court found that “[e]ven if . . . taken at face value,” such  
9 evidence was “insufficient to establish that [plaintiffs’]  
10 theory c[ould] be proved on a classwide basis.” Id. at 2555.  
11 “Merely showing that Wal-Mart’s policy of discretion had  
12 produced an overall sex-based disparity does not suffice.”  
13 Id. at 2556. The “more fundamental” failure in plaintiffs’  
14 proof though was their failure to “identif[y]” [a] ‘specific  
15 employment practice’ - - much less one that ties all their  
16 1.5 million claims together.” Id. at 1255-56. Plaintiffs’  
17 anecdotal evidence in Dukes was similarly defective and “too  
18 weak to raise an inference that all the individual,  
19 discretionary personnel decisions are discriminatory[.]”  
20 because it did not focus on particular Wal-Mart stores. Id.  
21 Thus, because the plaintiffs did not provide “convincing  
22 proof of a companywide discriminatory pay and promotion  
23 policy,” the Dukes Court held that they did “not establish[]  
24 the existence of any common question.” Id. (footnote  
25 omitted).

### 26 **c. Analysis**

27 Before considering whether plaintiffs have shown  
28 commonality post-Dukes, it is necessary to clarify the scope

1 of their pay claim. Since seeking class certification in  
2 2004, plaintiffs have severely restricted the scope of that  
3 claim. Originally, plaintiffs' pay claim had encompassed a  
4 pay policy purporting to have "elements of local manager  
5 subjectivity[,]" Pls.' Supp. Br. (Doc. 302) at 18:27, n. 9,  
6 the so-called, "Subjective Placement claim[.]" Pls.' Reply  
7 (Doc. 303) at 5:16-17. Plaintiffs unequivocally declare that  
8 they "did not pursue that policy on . . . appeal . . . and no  
9 longer seek certification of that claim[,]" however. Pls.'  
10 Supp. Br. (Doc. 302) at 18:27-28, n. 9.

11 Another component of plaintiffs' pay claim had been  
12 Bashas' alleged failure to pay Sunday premiums to Food City  
13 employees. Plaintiffs make only "passing reference" to the  
14 Sunday premiums; and, more importantly, they have not come  
15 forth with any factual support for this claim, as Bashas'  
16 accurately notes. See Def.'s Supp. Br. (Doc. 301) at 2:26,  
17 n. 2 (citation omitted). Furthermore, as Bashas' also  
18 correctly notes, "[p]laintiffs never raised this [issue]  
19 again and neither this Court nor the [Ninth] Circuit . . .  
20 addressed it." Id. at 2:27-28, n. 2. Plaintiffs have,  
21 therefore, implicitly abandoned the Sunday premiums aspect of  
22 their pay claim. Through their actions or, as the case may  
23 be, inaction, plaintiffs' pay claim now consists solely of  
24 what they describe as Bashas' "written Two-Tiered Wage Scale  
25 [("the wage scale")][.]"<sup>12</sup> Pls.' Reply (Doc. 303) at 5:17-18.

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26  
27 <sup>12</sup> Bashas' twice acknowledges that plaintiffs are challenging its  
28 pay scales. See Def.'s Supp. Br. (Doc. 301) at 9:19-20 (citations omitted)  
(emphasis added) (identifying "Bashas' pay scales[]" as "the actual  
employment practice challenged in this case[]"); and id. at 10:19-20  
(emphasis added) (defining the "issue at hand[]" as whether the challenged

1 The court will limit its analysis accordingly.

2 Plaintiffs are pursuing two closely related, although  
3 not identical, theories of discrimination with respect to  
4 Bashas' wage scales - disparate treatment and disparate  
5 impact.<sup>13</sup> See Pls.' Supp. Br. (Doc. 302) at 17:28-18:2.  
6 Borrowing from Dukes, plaintiffs assert that they do have a  
7 common answer to the "crucial question" posed therein, "[w]hy  
8 was I disfavored?" See Dukes, 131 S.Ct. at 2552 (emphasis in  
9 original). The common answer, plaintiffs posit, is because  
10 Bashas' "adopted a lower wage scale for predominantly  
11 Hispanic Food City employees doing the same work as their  
12 white counterparts at Bashas' and A.J.'s Fine Foods." Pls.'  
13 Supp. Br. (Doc. 302) at 17:26-28. Thus, regardless of which

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14  
15 pay scales constitute a discriminatory practice[]"). Yet, in its reply  
16 Bashas' seems to disavow that view, declaring that "[w]hile Plaintiffs  
17 claim to challenge [its] pay scales, in reality, they [are] rely[ing] on  
18 statistically derived average pay differences between Hispanic Food City  
19 employees and their counterparts working in other Bashas' formats." Def.'s  
20 Resp. (Doc. 304) at 3:3-5 (emphasis in original). Even assuming *arguendo*  
that is so, it does not change the fact that plaintiffs' equal pay claim  
centers on Bashas' wages scales themselves.

21 <sup>13</sup> For the most part, the parties have overlooked the distinction  
22 between these two theories. For example, in its reply Bashas' outlines the  
23 legal framework for a *prima facie* case of disparate impact, Def.'s Resp.  
24 (Doc. 304) at 4:1-22, but it seems to couch its Dukes-based arguments in  
terms of disparate treatment, not disparate impact.

25 Bashas' is not alone in this tendency. Even though they are pursuing  
26 both, plaintiffs did not separately analyze disparate impact and disparate  
27 treatment in terms of commonality or otherwise. Cf. Ellis v. Costco  
28 Wholesale Corp., 285 F.R.D. 492, 510 (N.D.Cal. 2012) ("Ellis II")  
("[B]ecause there are differences with respect to the way *Dukes* might be  
applied to disparate treatment, as opposed to disparate impact claims, the  
Court . . . address[ed] these claims separately[.]") Following the  
parties' lead, and without the advantage of their fully briefed views on  
this issue, this court, too, will not distinguish between disparate  
treatment and disparate impact at this stage. That does not foreclose the  
possibility that that distinction will become relevant later in this  
litigation.



1 theory their pay claim is grounded upon, plaintiffs contend  
2 that they have met Dukes' commonality standard because  
3 "[r]esolution of whether Bashas' [pay] policy violates Title  
4 VII and Section 1981 . . . will resolve the question for all  
5 class members." Id. at 17:23-25.

6 Bashas' responds that commonality is lacking because, as  
7 in Dukes, the plaintiffs "cannot provide proof of a  
8 companywide discriminatory pay practice." Def.'s Supp. Br.  
9 (Doc. 301) at 12:24 (emphasis omitted). Bashas' further  
10 responds that, also like Dukes, neither plaintiffs'  
11 statistical nor their anecdotal evidence suffice to establish  
12 commonality. Patterning its argument after the evidentiary  
13 shortcomings in Dukes only serves to lay bare the flaws in  
14 Bashas' commonality analysis, however. Although Bashas'  
15 assails the evidence of plaintiffs' statistician, Dr. Richard  
16 Drogin, it cannot now distance itself from "three significant  
17 . . . conce[ssions]" it made earlier in this litigation. See  
18 Parra II, 536 F.3d at 979. Bashas' retained Dr. Michael P.  
19 Ward, an economist and statistician, to refute Dr. Drogin's  
20 statistical analyses. Dr. Ward conceded these conclusions  
21 reached by Dr. Drogin:

22 (1) Food City Stores have a higher  
23 percentage of Hispanic employees  
24 compared to Bashas' or A.J.'s stores,  
25 (2) the pay scales at Bashas' and A.J.'s  
26 stores were higher than those at Food City  
27 during the period 1998-2000, and (3)  
28 Hispanic employee hourly rates were  
lower in similar jobs.

Id.; see also Parra I, 2005 WL 6182338, at \*16 (same).

Bashas' wage scales, in combination with these concessions,  
provide the "convincing proof of a companywide discriminatory

1 pay . . . policy" missing from Dukes. See Dukes, 131 S.Ct.  
2 at 2556.

3 Indeed, even prior to Dukes, the Ninth Circuit was  
4 similarly convinced, explaining that:

5           These pay scales were common for all Bashas',  
6           Inc. employees and provided for different  
7           pay for similar jobs based only on the store  
8           where the employee worked. The proposed class  
9           here shares the alleged discriminatory pay  
          scales of Bashas', Inc. The class definition  
          seeks to reach those Hispanic employees who  
          suffered past discrimination under these pay  
          scales.

10 Parra II, 536 F.3d at 979. The foregoing seriously erodes  
11 Bashas' assertion that plaintiffs have not shown commonality  
12 because Dr. Drogin "fail[ed] to "identify . . . a 'specific  
13 employment practice' or one that impacts all of the  
14 individuals in the proposed class." Def.'s Supp. Br. (Doc.  
15 301) at 10:24-26 (citing Dukes, 131 S.Ct. at 2555).

16 Relatedly, the foregoing also deeply undercuts Bashas'  
17 bald assertion that commonality is lacking because the  
18 plaintiffs cannot show that they "'have suffered the same  
19 injury[.]'" Def.'s Supp. Br. (Doc. 301) at 9:14-15 (quoting  
20 Dukes, 131 S.Ct. at 2551) (emphasis added by Bashas'). The  
21 putative class members have suffered the same injury: they  
22 received lower wages than their Caucasian counterparts at  
23 A.J.'s and Bashas' stores at least "during the period 1998-  
24 2000[]" when, it is undisputed, that "the pay scales at  
25 Bashas' and A.J.'s stores were higher than those at Food  
26 City[.]" See Parra II, 536 F.3d at 977 ("according to  
27 [Bashas'] pay scales, the hourly pay disparities for  
28 comparable jobs at the three brand named stores ranged from

1 \$0.15 per hour to \$2.94 per hour[,]" which "translate to  
2 annual salary differences of around \$300 per year to almost  
3 \$6,000 per year[.]"). Thus, unlike Dukes, this is not a "mere  
4 claim by [current and former Food City] employees that they  
5 have suffered a Title VII injury, or even a disparate-impact  
6 Title VII injury[.]" See Dukes, 131 S.Ct. at 2551. Rather,  
7 as is evident, plaintiffs' pay claims can "productively be  
8 litigated at once." See id.

9 In addition, Bashas' attacks on plaintiffs' statistical  
10 evidence are largely immaterial because they are directed  
11 primarily at Dr. Drogin's regression analyses, which  
12 plaintiffs offered to support their "Subjective Placement  
13 claim[]" - a claim they are no longer pursuing.<sup>14</sup> Pls.' Reply  
14 Br. (Doc. 303) at 7:1-2 (footnote omitted). Bashas' fares no  
15 better with its attacks on plaintiffs' anecdotal evidence -  
16 declarations from 13 former and current Bashas' employees. As  
17 with their statistical evidence, Bashas' contends that  
18 plaintiffs cannot establish commonality because, their  
19 anecdotal evidence, *inter alia*, does not "provide  
20 'significant proof' that [Bashas'] operated under a general  
21 policy of discrimination[.]'" Def.'s Supp. Br. (Doc. 301) at  
22 11:9-10 (quoting Dukes, 131 S.Ct. at 2553). Plaintiffs  
23 counter, and the court agrees, that their anecdotal evidence  
24 is "unnecessary to establish commonality[,]" Pls.' Reply  
25 (Doc. 303) at 7:15 (emphasis omitted), given the "three

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26  
27 <sup>14</sup> Given the simultaneous filing of the opening post-Dukes briefs,  
28 Bashas' cannot be faulted in its opening brief for concentrating on its  
perceived deficiencies in Dr. Drogin's analyses. Bashas' had no way of  
knowing when it filed that brief, that plaintiffs would be abandoning their  
Subjective Placement claim.

1 significant conclusions conceded by Bashas' " and identified  
2 above. See Parra II, 536 F.3d at 979.

3 Of equal import is that Bashas' written, non-  
4 discretionary, centralized wage scale under which, as  
5 plaintiffs allege and the evidence indicates, Hispanic Food  
6 City hourly employees were paid less than their Caucasian  
7 counterparts at Bashas' and A.J.'s stores, is precisely what  
8 was missing in Dukes. See Dukes, 131 S.Ct. at 2548  
9 (emphasis added) ("These plaintiffs . . . do not allege that  
10 Wal-Mart has any express corporate policy against the  
11 advancement of women.") Bashas' wage scales "provide the  
12 'glue' the Supreme Court sought – but did not find – in  
13 Dukes, sufficient to 'say that examination of all the class  
14 members' claims for relief will produce a common answer to  
15 the crucial question *why was I disfavored*." Ellis II, 285  
16 F.R.D. at 530 (emphasis in original) (quoting Dukes, 131  
17 S.Ct. at 2552).

18 So, for example, if a trier of fact finds that Bashas'  
19 wage scales "lead to disparate outcomes[,]" that "is a common  
20 question subject to classwide proof and rebuttal." See id. at  
21 531. In the parlance of Dukes, determining the "truth or  
22 falsity" of whether Bashas' wage scales violate Title VII or  
23 section 1981 in the manner alleged "will resolve in one  
24 stroke[]" an issue that is "central to the validity" of each  
25 class member's pay claim. See Dukes, 131 S.Ct. at 2551; see  
26 also Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015,  
27 1029 (9<sup>th</sup> Cir. 2012) (quoting Dukes, 131 S.Ct. at 2551) (claim  
28 that defendant violated the Fair Debt Collection Practices

1 Act by sending "collection notices addressed to the debtor,  
2 but in 'care of' the debtor's employer, without first  
3 obtaining consent[,] . . . is a common contention among the  
4 class and 'determination of its truth or falsity' is pivotal  
5 to this lawsuit and is capable of determination 'in one  
6 stroke[]'"). "This case," at least insofar as the equal pay  
7 claim is concerned, "presents the classic case for treatment  
8 as a class action: that is, the commonality linking the class  
9 members is the dispositive question in the lawsuit." See  
10 Evon, 688 F.3d at 1030 (internal quotation marks and citation  
11 omitted).

12 Notably, "commonality only requires a *single* significant  
13 question of law or fact.'" Mazza, 666 F.3d at 589 (quoting  
14 Dukes, 131 S.Ct. at 2556) (emphasis added). Further easing a  
15 plaintiff's burden at this stage is that Rule 23(a)(2)'s  
16 commonality requirement is to be "construed permissively, and  
17 "[a]ll questions of fact and law need not be common to  
18 satisfy the rule." Ellis I, 657 F.3d at 981 (internal  
19 quotation marks and citation omitted); see also Evon, 688  
20 F.3d at 1030 (internal quotation marks and citation omitted)  
21 ("It is not necessary that members of the proposed class  
22 share every fact in common.") Plaintiffs thus have a "limited  
23 burden under Rule 23(a)(2)[.]" Mazza, 666 F.3d at 589.  
24 Consequently, even in the wake of Dukes, for the reasons  
25 outlined above, this court has little difficulty finding that  
26 a class proceeding herein has "the capacity to generate  
27 common *answers* apt to drive the litigation" insofar as the  
28 equal pay claim is concerned. See Dukes, 131 S.Ct. at 2551

(internal quotation marks and citation omitted) (emphasis in original); see also Gales v. Winco Foods, 2011 WL 3794887, at \*2 (N.D.Cal. Aug. 26, 2011)(finding commonality where plaintiff identified an employer's policy of exempting from overtime all assistant managers). No individualized inquiry is necessary to determine whether Bashas' wage scales violate federal law.

While not alone dispositive, the difference in scale between Dukes further underscores why Dukes does not preclude a finding of commonality here. Dukes was "one of the most expansive class actions ever[,] comprised of approximately 1.5 million members. Dukes, 131 S.Ct. at 2547. Moreover, the Dukes plaintiffs "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed." Id. (internal quotation marks and citation omitted). Additionally, the plaintiffs in Dukes were challenging "literally millions of employment decisions." Id. at 2552, 2556 n. 9. Given this factual scenario, the court agrees with Judge Sand's astute observation in Chen-Oster v. Goldman, Sachs & Co., 2012 WL 2912741 (S.D.Cal. July 17, 2012):

The Supreme Court suggested (when not explicitly stating) that the sheer size of the class and the vast number and diffusion of challenged employment decisions was key to the commonality decision. This makes a great deal of sense when the purpose of the commonality enquiry is to identify 'some glue holding the

1                   alleged reasons for all of [the  
2                   challenged] employment decisions together.'

3     Id. at \*3 (quoting Dukes, 131 S.Ct. at 2552 (emphasis  
4     omitted)).

5           The present case is vastly different. There are not  
6     millions of potential plaintiffs here. Nor are the  
7     plaintiffs scattered across the nation; they all work or  
8     worked at Arizona Food City stores. And, they are not  
9     challenging "millions of employment decisions;" rather, at  
10    this point, they are only challenging Bashas' decision to pay  
11    its employees pursuant to its two-tiered wage scales. These  
12    factual distinctions reinforce this court's conclusion that  
13    plaintiffs have met their burden of showing commonality as to  
14    the equal pay claim.

15                   **3. Typicality**<sup>15</sup>

16           Next, plaintiffs must show that "the claims or defenses  
17    of the representative parties [are] typical of the claims or  
18    defenses of the class." Fed. R. Civ. P. 23(a)(3). Bashas'  
19    argues that the claims of named plaintiffs Estrada and  
20    Martinez are not typical of those of the putative class  
21    because there is no evidence of a shared "common  
22    experience[.]" Bashas' Response to Motion for Class

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23  
24           <sup>15</sup> In Parra I, this court addressed typicality, but only with  
25    respect to the working conditions claim. Indeed, after finding a lack of  
26    commonality as to the equal pay claim, the court explicitly noted that it  
27    had "not reached the other requirements for class certification on this  
28    [equal pay] issue, and express[ed] no opinion on whether Plaintiffs could  
   satisfy" the requirements of typicality and adequacy as to that claim.  
   Parra I, 2005 WL 6182338, at \*16, n. 30 (emphasis added). Moreover, given  
   the Ninth Circuit's remand, as earlier noted, "for consideration of the  
   remaining class certification factors[.]" undeniably the issue of whether,  
   *inter alia*, plaintiffs have shown typicality as to their pay claim is  
   properly before the court now.

1 Certification ("Def.'s Resp. MCC") (Doc. 190) at 45:9. As  
 2 to plaintiff Martinez alone, Bashas' argues that because she  
 3 works as a Food City Tortilla Ria Clerk, and that position  
 4 has "no comparable position in Bashas' or A.J.'s stores[,]"<sup>16</sup>  
 5 her pay claim is "unique to her," and thus not typical for  
 6 Rule 23(a)(3) purposes. *Id.* at 59:21 (footnote omitted); and  
 7 61:12. Bashas' also argues that because plaintiff Martinez  
 8 did not exhaust her administrative remedies, that is a  
 9 defense unique to her, thus precluding a finding that she is  
 10 a typical class representative.<sup>17</sup> The court will address the  
 11 arguments pertaining solely to plaintiff Martinez first.

12 **a. Aurelia Martinez**

13  
 14 <sup>16</sup> Some preliminary clarification is necessary. Bashas', like the  
 15 plaintiffs, declares that plaintiff Martinez has worked in "one position,  
 16 tortilleria [sic] clerk, since 1991." Def.'s Resp. MCC (Doc. 190) at  
 17 59:18-21 (emphasis in original) (citation omitted); Plaintiffs' Motion for  
 18 Class Certification ("Pls.' MCC") (Doc. 159) at 14:23, ¶ 12 (citation  
 19 omitted) ("Aurelia Martinez has been employed as a tortilleria [sic] clerk  
 at a Food City store in Phoenix since July 1991.") The record belies this  
 statement, revealing that Ms. Martinez worked both as a Tortilla Ria Clerk  
 and as Tortilla Machine Operator. This is noteworthy because a basic  
 tenet of Bashas' argument that plaintiff Martinez's pay claim is atypical  
 is that she works, and has always worked, as a Tortilla Ria Clerk.

20 From Bashas' Payroll Status Authorization form, it appears, however,  
 21 that in roughly mid-September 2001 Ms. Martinez was promoted to a Tortilla  
 22 Machine Operator. Martinez Decl'n (Doc. 163), exh. A thereto. Regardless  
 23 of the exact date of Ms. Martinez's promotion, a Bashas' Performance  
 24 Evaluation form shows that she held that position at least from January,  
 2001 to January, 2002. *Id.*, exh. B thereto. So although there is  
 uncertainty on this record as to exactly when Ms. Martinez first became  
 employed as a Tortilla Ria Clerk, and when she became a Tortilla Machine  
 Operator, clearly she held both positions at different times during the  
 class period. However, because the parties' are focusing exclusively upon  
 Ms. Martinez's status as a Tortilla Ria Clerk, so, too, will the court.

25 <sup>17</sup> Like commonality, typicality "tend[s] to merge with the adequacy-  
 26 of-representation requirement[.]" *Dukes*, 131 S.Ct. at 2551 n. 5. So  
 27 although Bashas' presents these arguments when discussing adequacy, the  
 28 court will address them now - in the context of typicality. *Cf. Ellis I*,  
 657 F.3d at 974 (citation omitted) (vacating "ruling as to 'typicality'  
 . . . because the district court failed to consider the effect that  
 defenses unique to the named Plaintiffs' claims have on that questions[.]").



1 An integral part of Bashas' exhaustion argument is that  
 2 because Ms. Martinez's pay claim is unique, plaintiff  
 3 Estrada's Equal Employment Opportunity Commission ("EEOC")  
 4 charge, among others, did not provide Bashas' with adequate  
 5 notice of her pay claim. So before considering Bashas'  
 6 exhaustion argument *per se*, the court first must decide  
 7 whether plaintiff Martinez's pay claim is unique.

8 **i. "Tortilla Ria Clerk"**<sup>18</sup>

9 Bashas' argues that plaintiff Martinez's pay claim is  
 10 "unique to her[]" because she works as a Food City Tortilla  
 11 Ria Clerk, and that position has "no comparable position in  
 12 Bashas' or A.J.'s stores."<sup>19</sup> Def.'s Resp. MCC (Doc. 190) at  
 13 61:12; and 59:21 (footnote omitted). Disagreeing,  
 14 plaintiffs assert that a Tortilla Ria Clerk is the  
 15  
 16

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17 <sup>18</sup> This designation is taken directly from Bashas' wage scales.  
 18 See, e.g., Def.'s exh. 1 (Proulx Aff.), exh. G thereto at BA 04350.

19 <sup>19</sup> Some preliminary clarification is necessary. Bashas', like the  
 20 plaintiffs, declares that plaintiff Martinez has worked in "one position,  
 21 tortilleria [sic] clerk, since 1991." Def.'s Resp. MCC (Doc. 190) at  
 22 59:18-21 (emphasis in original) (citation omitted); Pls.' MCC (Doc. 159) at  
 23 14:23, ¶ 12 (citation omitted) ("Aurelia Martinez has been employed as a  
 24 tortilleria [sic] clerk at a Food City store in Phoenix since July 1991.")  
 25 The record belies this statement, revealing that Ms. Martinez worked both  
 26 as a Tortilla Ria Clerk and as Tortilla Machine Operator. This is  
 27 noteworthy because a basic tenet of Bashas' argument that plaintiff  
 28 Martinez's pay claim is atypical is that she works, and has always worked,  
 as a Tortilla Ria Clerk.

From Bashas' Payroll Status Authorization form, it appears, however,  
 that in roughly mid-September 2001 Ms. Martinez was promoted to a Tortilla  
 Machine Operator. Martinez Decl'n (Doc. 163), exh. A thereto. Regardless  
 of the exact date of Ms. Martinez's promotion, a Bashas' Performance  
 Evaluation form shows that she held that position at least from January,  
 2001 to January, 2002. *Id.*, exh. B thereto. So although there is  
 uncertainty on this record as to exactly when Ms. Martinez first became  
 employed as a Tortilla Ria Clerk, and when she became a Tortilla Machine  
 Operator, clearly she held both positions at different times during the  
 class period. However, because the parties' are focusing exclusively upon  
 Ms. Martinez's status as a Tortilla Ria Clerk, so, too, will the court.

1 "equivalent" of a Donut Fryer,<sup>20</sup> and thus, plaintiff  
2 Martinez's pay claim is typical of the putative class  
3 members. Pls.' Reply (Doc. 207) at 27:9 (citation omitted).

4 In resolving this dispute, the court is fully aware of  
5 its earlier comment that "[w]ithout further information[]" it  
6 could not "determine whether Martinez's position [as a  
7 Tortilla Ria Clerk] has a comparable counterpart in  
8 Defendant's other stores." Parra I, 2005 WL 6182338, at \*18.  
9 The court immediately noted, however, that "[r]egardless,  
10 Martinez claims she has suffered from the same alleged  
11 *disparate working conditions* as the proposed class members."  
12 Id. (emphasis added). So "[w]hile close," this court found  
13 that Ms. Martinez sufficiently satisfie[d] the typicality  
14 requirement of Rule 23(a)(3) *on that issue[,]*" i.e. the  
15 working conditions claim. Id. (emphasis added).

16 In Parra I, this court was able to decide the typicality  
17 issue as to Ms. Martinez's working conditions claim without  
18 resolving whether a Food City Tortilla Ria Clerk has a  
19 "comparable counterpart" in A.J.'s or Bashas' stores.  
20 Therefore, the court's earlier quoted comment is, at most,  
21 non-authoritative dictum, allowing it to visit that issue  
22 against the backdrop of plaintiff Martinez's pay claim.

23 Probing more deeply into the record, as part of its  
24

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25 <sup>20</sup> More recently, plaintiffs took the position that Martinez's  
26 "position as a tortilla clerk is equivalent to a *higher paid* position,  
27 donut fryer, in the Bashas' stores." Pls.' Supp. Br. (Doc. 302) at 20:3-4  
28 (emphasis added) (citations and footnote omitted). Plaintiffs' cites do  
not support that proposition, however. Moreover, as Bashas' pay scales,  
among other things, reveal, and as plaintiffs argue above, Bashas' places  
Tortillaria Clerks and Donut Fryers in the same wage bracket, undermining  
this assertion that Donut Fryers are in a "higher paid position."

1 obligation to rigorously analyze whether the prerequisites of  
2 Rule 23(a) have been met, convinces this court that plaintiff  
3 Martinez's pay claim is typical of those of the putative  
4 class. Most significantly, Bashas' own pay scales do not  
5 differentiate between "Tortilla Ria Clerk[s] & Donut  
6 Fryer[s]" [.] See, e.g., Larkin Decl'n (Doc. 161), exh. 13  
7 thereto at BA 00196; exh. 14 thereto at BA 00206. Even if  
8 the duties differ, Bashas' repeatedly classifies a Tortilla  
9 Ria Clerk and a Donut Fryer together in one, single category  
10 for wage purposes. See Bashas' exh. 1 (Proulx Aff.), exh. G  
11 thereto at BA 04350; exh. H thereto at BA 04340; exh. I  
12 thereto at BA 04321; exh. J thereto at BA 04283; exh. K  
13 thereto at 2; exh. L thereto at BA 04256 - 04258; exh. M  
14 thereto at BA 08281 - 0828<sup>21</sup>; BA 08293; BA 08295. This joint  
15 designation is not a one-time aberration. The joint  
16 designation for "Tortillaria Clerk, [and] Donut Fryer" is  
17 found elsewhere, on "Bashas' Wage and Employee Benefit  
18 Program[.]" Larkin Supp. Decl'n (Doc. 196), exh. 10 thereto  
19 at BA 04231.

20 Tortillaria Clerk and Donut Fryer are not the only joint  
21 designations for wage purposes. Bashas' also jointly places  
22 a "Lead Deli Clerk[]" and a "Cappuccino Manager" - two  
23 positions which on the face of it seem to have little in  
24 common - into one wage category. See id., exh. 10 thereto at  
25 BA 04231. Thus, there are certain job positions which, for  
26 whatever reasons, Bashas' deems so closely analogous to  
27 warrant placing them in the same wage category.

28 Had Bashas' wanted to distinguish between Tortillaria

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<sup>21</sup> The Bates stamp number is obstructed on the copy provided to the court.

1 Clerks and Donut Fryers, it could have, as it did for  
2 Tortilla Production Supervisors and Tortilla Machine  
3 Operators. Those are separate job listings, with separate  
4 wages; and, for the most part, employees in those positions  
5 are paid more than employees in the Tortilla Ria Clerk and  
6 Donut Fryer category. See e.g., exh. 10 thereto at BA 04234.  
7 The fact remains, however, that Bashas' did not make any  
8 distinction in terms of wages with respect to those two  
9 positions.

10 For these reasons, based upon the record as presently  
11 constituted, to the extent Ms. Martinez is premising her  
12 equal pay claim upon her tenure as a Food City Tortilla Ria  
13 Clerk, her pay claim is typical of the pay claims of the  
14 putative class. In reaching this conclusion the court has,  
15 as it must, focused on the *nature of the claim* or defense of  
16 the class representative, *and not to the specific facts* from  
17 which it arose or the relief sought." See Ellis I, 657 F.3d  
18 at 984 (internal citation and quotation marks omitted)  
19 (emphasis added). That is because "[d]iffering factual  
20 scenarios resulting in a claim of the same nature as other  
21 class members does not defeat typicality." Id. at 985, n. 9  
22 (citation omitted). Having found that plaintiff Martinez's  
23 pay claim is typical of those of the class, the next issue is  
24 whether, as Bashas' argues, her failure to exhaust her  
25  
26  
27  
28

1 administrative remedies is a unique defense which would  
2 defeat typicality.

3 **ii. Exhaustion of Administrative Remedies**

4 A plaintiff must file a timely charge of discrimination  
5 with the EEOC as a prerequisite to bringing a Title VII  
6 action. 42 U.S.C. § 2000e-5(e). There is no dispute that  
7 Plaintiff Estrada filed such a charge and exhausted his  
8 administrative remedies, see Bashas' exh. 40, and that  
9 plaintiff Martinez did not. Bashas' argues that plaintiff  
10 Martinez's failure to exhaust her administrative remedies is  
11 a "defense unique" to her, which bars her from serving as a  
12 class representative as to any Title VII claims. Def.'s Resp.  
13 MCC (Doc. 190) at 58:21, n. 39.<sup>22</sup>

14 Accurately reciting that notice is the underlying purpose  
15 of Title VII's exhaustion requirement, see B.K.B. v. Maui  
16 Police Dep't, 276 F.3d 1091, 1099 (9<sup>th</sup> Cir. 2002), plaintiffs  
17 invoke the "single filing" or "piggyback" rule. Under that  
18 exception to exhaustion, "an individual who has not filed an  
19 administrative charge can 'piggyback' on an EEOC complaint  
20 filed by another person who is similarly situated."<sup>23</sup>

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21  
22 <sup>22</sup> Section 1981 does not contain a similar exhaustion requirement.  
23 Therefore, Bashas' failure to exhaust argument is limited to plaintiffs' Title VII claims.

24 <sup>23</sup> In Parra I, when discussing typicality as to the working  
25 conditions claim, this court mentioned in passing that although Ms.  
26 Martinez had not exhausted her administrative remedies, she "may  
27 'piggyback' onto Estrada's efforts and go forth with her Title VII claim."  
28 Parra I, 2005 WL 6182338, at \*17 (citing Albemarle Paper Co. v. Moody, 422  
U.S. 405, 414 n. 8, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975)). On its face,  
that quote might appear to be dispositive of the exhaustion argument  
herein. However, it is not.

There are two reasons for addressing the exhaustion argument anew at  
this juncture. First, in Parra I, this court expressly declined to reach the  
issue of typicality as to the equal pay claim. See n. 15 supra. Second,  
although this court is not alone in citing footnote 8 in Albemarle for the

1 E.E.O.C. v. Giumarra Vineyards Corp., 2010 WL 3220387, at \*4  
2 (E.D.Cal. Aug. 13, 2010) (footnote and citation omitted).  
3 Plaintiffs contend that Ms. Martinez is similarly situated to  
4 "[s]everal [unspecified] members of the proposed class [who]  
5 filed EEOC charges against [Bashas'] all alleging class  
6 discrimination." Pls.' Reply (Doc. 207) at 25:7-9.  
7 Plaintiffs thus reason that as a result of those EEOC  
8 charges, Bashas' had "notice of the 'substantive claims being  
9 brought against [it] [and] of the number and generic  
10 identities of the potential plaintiffs who may participate in  
11 the judgment.'" Id. at 25:9-12 (quoting American Pipe &  
12 Construction Co. v. Utah, 414 U.S. 538, 555, 94 S.Ct. 756, 38  
13 L.Ed.2d 713 (1974)). Given that purported notice, plaintiffs  
14 argue that Ms. Martinez's failure to exhaust her  
15 administrative remedies is not a defense unique to her.  
16 Named plaintiff Martinez thus meets Rule 23(a)(3)'s  
17 typicality requirement irrespective of her failure to exhaust  
18 her administrative remedies, plaintiffs reason.

19 Bashas' retorts that the other EEOC charges did not  
20 provide the requisite notice because those charges "were not  
21 detailed, did not give [it] notice of the claims of the other  
22

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23 proposition that unnamed class members need not file charges for Title VII  
24 suits to proceed, see, e.g., Dukes v. Wal-Mart Stores, Inc., 2002 WL  
32769185, at \*7 n. 4 (N.D.Cal. Sept. 9, 2002) ("Wal-Mart Stores"), a close  
25 reading of Albemarle reveals that it does not speak directly to the issue  
26 squarely before the court now: whether a named plaintiff who has not  
27 exhausted her administrative remedies can, nonetheless, be an adequate  
28 representative under Rule 23(a)(4). Rather, footnote 8 answers in the  
affirmative the issue of whether "backpay may be awarded on a class basis  
even without exhaustion of administrative procedures by the unnamed class  
members." See Albemarle, 422 U.S. at 414 n. 8, 95 S.Ct. 2362 (emphasis  
added).

1 class members, and in particular, could not have possibly  
2 given [it] notice of Martinez' claims, because of their  
3 uniqueness." Def.'s Resp. MCC (Doc. 190) at 58, n. 39:26-27  
4 (citation omitted). Bashas' argument lacks both legal and  
5 factual support.

6 In arguing that exhaustion of administrative remedies is  
7 an essential predicate to serving as a class representative,  
8 Bashas' relies upon this single sentence from Inda v. United  
9 Air Lines, Inc., 565 F.2d 554 (9<sup>th</sup> Cir. 1977):

10 "[I]f one brings suits on his own behalf,  
11 or as a named plaintiff on behalf of a  
12 class, he must have secured a right to sue  
by timely following the procedures set  
forth in Title VII."

13 Id. at 559. Plaintiffs counter that Gibson v. Local 40,  
14 Supercargoes & Checkers, 543 F.2d 1259 (9<sup>th</sup> Cir. 1976),  
15 "foreclose[s]" Bashas' Inda based argument. Pls.' Reply MCC  
16 (Doc. 207) at 24:9. In Gibson, noting that only one  
17 plaintiff had filed an EEOC charge, the Ninth Circuit  
18 observed, "[t]his does not preclude representation of the  
19 class by the other named plaintiffs or relief for the class."  
20 Gibson, 543 F.2d at 1266 n. 13 (emphasis added) (citing  
21 Franks v. Bowman Transp. Co., 424 U.S. 747, 771, 96 S.Ct.  
22 1251, 1267, 47 L.Ed.2d 444 (1976); Albemarle, 422 U.S. at 414  
23 n.8, 95 S.Ct. 2362)).

24 As plaintiffs strongly imply, Inda does not govern here,  
25 but, then again, neither does Gibson. Plaintiffs fault  
26 Bashas' for relying upon Inda, which it characterizes as  
27 "dictum[,]" and because since 1977, when Inda was decided,  
28 "[n]o Ninth Circuit case . . . has read *Inda* to impose . . .

1 a requirement[]" that each named plaintiff must exhaust their  
2 administrative remedies to serve as a class representative.  
3 See Pls.' Reply (Doc. 207) at 24:24-25. Somewhat ironically,  
4 plaintiffs' reliance upon Gibson is misplaced for nearly  
5 identical reasons. The portion of Gibson upon which  
6 plaintiffs are relying also is dictum. And, in the 37  
7 years since Gibson, it has never been read to support the  
8 view that a named plaintiff need not exhaust their  
9 administrative remedies.<sup>24</sup> Thus, there is no credence to  
10 plaintiffs' argument that Gibson "forecloses" Bashas'.

11 Bashas' reliance upon Inda is equally unavailing. In the  
12 past 36 years, the Ninth Circuit has never invoked Inda to  
13 require each named plaintiff to individually exhaust their  
14 administrative remedies. More importantly, "to the extent  
15 [the] language [quoted above] in Inda is not dicta, it has  
16 been restricted to its facts where a plaintiff sought to rely  
17 on an administrative charge of an individual employee in a  
18 separate action, and where the EEOC charge did not give  
19 sufficient notice that other similarly-situated persons would  
20 also be affected." E.E.O.C. v. Cal. Psychiatric Transitions,  
21 Inc., 644 F.Supp.2d 1249, 1265 n. 11 (E.D.Cal. 2009)

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22  
23 <sup>24</sup> This is not surprising given the Gibson Court's reference to  
24 Franks and Albemarle. Those two Supreme Court cases considered whether  
25 unnamed plaintiffs can recover under Title VII; both found that they could.  
26 Albemarle, 422 U.S. at 414 n. 8, 95 S.Ct. 2362 ("reject[ing] th[is]e  
27 contention[] . . . that no backpay can be awarded to those unnamed parties  
28 in the plaintiff class who have not themselves filed charges with the  
EEOC[]"); Franks, 424 U.S. 771, 96 S.Ct. 1251 (unnamed class members who  
had been discriminated against by their employer, but who had not filed  
administrative charges with the EEOC, were not precluded from relief in the  
form of retroactive seniority). Neither of those decisions supports the  
view expressed in Gibson, however, and upon which plaintiffs so heavily  
rely, that an unnamed plaintiff, who has not filed an EEOC charge, may  
serve as class representative.



(citations omitted). More recently, citing to those two district court decisions, the Ninth Circuit left no doubt that "*Inda* should be limited to its specific facts - where a plaintiff sought to rely on an administrative charge . . . of an individual employee in a separate action." Harris v. County of Orange, 682 F.3d 1126, 1136-1137 (9<sup>th</sup> Cir. 2012) (citations omitted). That express limitation on Inda eviscerates Bashas' argument, premised solely on Inda, that Ms. Martinez is not an adequate class representative because she did not exhaust her administrative remedies under Title VII.

The Ninth Circuit's Harris decision has relevancy here beyond rejecting Inda's restrictive interpretation of the single filing rule. The Harris plaintiffs filed a class action on behalf of thousands of Retirees alleging that the "County's restructuring of its retiree medical program[,]" violated, *inter alia*, their constitutional rights and the Fair Employment and Housing Act ("FEHA"). Harris, 682 F.3d at 1130. One of the class representatives had timely filed an administrative charge, but it "did not state that it was 'on behalf of' other class members." Id. at 1131. Therefore, the district court found that the Retirees did not exhaust their administrative remedies under the FEHA.<sup>25</sup> On appeal, "[t]he Retirees argue[d] that the single filing rule permit[ted] them to 'piggyback' on the timely filed administrative complaint . . . of one of the named

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<sup>25</sup> Given the absence of relevant authority regarding the applicability of the single filing rule in FEHA actions, the court looked to Title VII cases, among others. Harris, 682 F.3d at 1136.

1 plaintiffs." Id. at 1135.

2 Agreeing, the Ninth Circuit reiterated that the "single  
3 filing rule is based on the observation that it would be  
4 duplicative and wasteful for complainants with similar  
5 grievances to have to file identical notices of intent to sue  
6 with a governmental agency." Id. at 1136 (citing Bean v.  
7 Crocker Nat'l Bank, 600 F.2d 754, 760 n. 15 (9<sup>th</sup> Cir. 1979));  
8 see also Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095,  
9 1110 (10<sup>th</sup> Cir. 2001) ("The policy behind the single filing  
10 rule is that it would be wasteful, if not vain, for numerous  
11 employees, all with the same grievance, to have to process  
12 many identical complaints with the EEOC.") Consequently, even  
13 though the Harris administrative complaint did not indicate  
14 that it was a "class action" or "'on behalf of others  
15 similarly situated[,]'" nonetheless, the Court found it was  
16 "sufficient to establish exhaustion of administrative  
17 remedies for all class members." Id. at 1136 and 1137  
18 (footnote omitted). That is because the other named  
19 plaintiffs, who had not filed administrative complaints were  
20 "part of the same action asserted by" the plaintiff who had  
21 timely filed such a complaint. Id. at 1137.

22 Here, as fully discussed herein, Ms. Martinez is "part of  
23 the same action asserted" by Mr. Estrada who did timely file  
24 an EEOC charge. Furthermore, in sharp contrast to the  
25 defendant employer in Harris, Bashas' had explicit,  
26 unequivocal notice of the existence of other similarly  
27 situated class members, such as Ms. Martinez. Bashas' had  
28 such notice because Mr. Estrada unambiguously declared that

1 he was "bring[ing] this charge on behalf of [him]self and  
2 similarly situated Hispanic employees who [sic] [he]  
3 believe[s] receive less pay and poorer assignments than  
4 American-born, white employees." Def.'s Resp. MCC (Doc.  
5 190), exh. 40 thereto. Not only that, arguably Bashas' had  
6 additional notice because "[a]t least eight class charges of  
7 race and national discrimination have been filed against [it]  
8 by current proposed plaintiffs and class member witnesses in  
9 this action." Pls.' Reply to Def.s' Resp. to Mot. for Leave  
10 to File First Amended Complaint (Doc. 103) at 5:10-12. Thus,  
11 if, as in Harris, the single filing rule can be applied  
12 although the administrative complaint was silent as to  
13 whether it was a class action or was being brought on behalf  
14 of others similarly situated, surely Ms. Martinez can rely  
15 upon that rule given that Mr. Estrada's EEOC charge was  
16 unequivocal and explicit on that point.

17 Wal-Mart Stores, further bolsters a finding that Ms.  
18 Martinez may "piggy-back" onto the EEOC charge of Mr.  
19 Estrada and others to establish exhaustion of her  
20 administrative remedies. There, the plaintiffs sought leave  
21 to amend to add two plaintiffs who had never filed EEOC  
22 charges. The moving plaintiffs were relying upon the EEOC  
23 charge of a named representative who had "filed charges on  
24 her own behalf as well as for others similarly situated."  
25 Wal-Mart Stores, 2002 WL 32769185, at \*5. Previously,  
26 however, that named plaintiff was dismissed for failure to  
27 meet Title VII's venue requirements and she became a putative  
28 class member. Among other reasons, including the Supreme

1 Court's recognition that "EEOC charge-filing requirements are  
2 . . . equitable in nature," and because "notice was afforded  
3 to Wal-Mart in accordance with the policy goals of Title  
4 VII," the Wal-Mart Stores court found "that all named  
5 plaintiffs in a Title VII class action need *not* individually  
6 exhaust EEOC charge-filing requirements prior to joining a  
7 class action." Id. at \*7 (emphasis added). The court  
8 further reasoned that "the policy underpinnings of Title VII  
9 and the single filing rule set forth in *Albermarle* - notice  
10 to the defendant - is fully satisfied where at least one  
11 plaintiff has filed a charge of discrimination alleging broad  
12 class claims; and (2) requiring additional identical filing  
13 serves no purpose other than to ensure duplicative  
14 administrative proceedings." Id. (citation and footnote  
15 omitted). The court thus held that "a proposed named  
16 plaintiff may rely on the administrative compliance of  
17 otherwise compliant fellow named representatives." Id.

18 As can be seen, "the analytical touchstone of the single  
19 filing rule is whether the company had adequate notice of the  
20 grievance to provide a basis for conciliation." Giumarra  
21 Vineyards, 2010 WL 3220387, at \*8. "A charge will be  
22 adequate to support piggybacking under the single filing rule  
23 if it contains sufficient information to notify prospective  
24 defendants of their potential liability and permit the EEOC  
25 to attempt informal conciliation of the claims before a  
26 lawsuit is filed." Cal. Psychiatric Transitions, 644  
27 F.Supp.2d at 1265 (citation omitted). However, "[t]he  
28 parties' claims need not be factually identical to those

1 timely filed, but instead need to be [of] sufficient  
2 similarity as to prevent frustration of Title VII policies."  
3 Id. at 1266 (citation omitted). The single filing rule thus  
4 intends to "give effect to the remedial purposes of [Title  
5 VII] and to not exclude other suitable plaintiffs from [a  
6 Title VII] class action simply because they have not  
7 performed the useless act of filing a charge." Giumarra  
8 Vineyards, 2010 WL 3220387, at \*4 (internal quotation marks  
9 and citation omitted).

10 "[L]ook[ing] to the predicate or 'actually filed' EEOC  
11 charge[]" of Mr. Estrada, id. (footnote and citations  
12 omitted), it is apparent that that charge gave Bashas' the  
13 requisite notice. After identifying himself as "Hispanic[,]"  
14 Mr. Estrada's charge informed Bashas', *inter alia*, of the  
15 nature of his pay claim:

16 While employed by Bashas', Inc. I  
17 believe that I have been discriminated  
18 against based upon my national origin and  
19 race with respect to pay[.]

20 Although the job I perform at Food  
21 City is substantially the same job  
22 as the work performed by my counterparts  
23 at Bashas', I am paid less on an hourly  
24 basis than the similarly situated employees  
25 at Bashas'. It is my belief and understanding  
26 that most of the employees at Bashas' are  
27 American born and Caucasian. I believe I  
28 am paid less because of my national origin,  
Mexican, and my race, Hispanic.

24 Def.'s Resp. MCC (Doc. 190), exh. 40. Further, Mr.  
25 Estrada explicitly states that he was bringing his EEOC  
26 charge "on behalf of [him]self and similarly situated  
27 Hispanic employees who[m] [he] believe[s] receive less pay  
28 and poorer assignments than American-born, white employees."

1 Id.

2 Similarly, the FAC alleges that Ms. Martinez, like Mr.  
3 Estrada, is a Hispanic hourly Food City employee, who was  
4 paid less than her Caucasian counterparts at Bashas' and  
5 A.J.'s. FAC (Doc. 116) at 3, ¶ 8. In light of the  
6 foregoing, Bashas' argument that it lacked notice of Ms.  
7 Martinez's pay claim is wholly unavailing. Further, for  
8 substantially the same reasons outlined in section A(3)(a)(i)  
9 above, Ms. Martinez's pay claim is not so unique from those  
10 of Mr. Estrada so that it can be said that Bashas' lacked  
11 notice of her pay claim on that basis. Hence, the asserted  
12 "uniqueness" of Ms. Martinez's pay claim does not vitiate  
13 that notice.

14 Taking another but equally unpersuasive tack, Bashas'  
15 contends that "[i]f Estrada (the only other named Plaintiff  
16 now suing on behalf of the class) is dismissed from the case  
17 or deemed inappropriate as class representative, Martinez  
18 could not take his place." Def.'s Resp. MCC (Doc. 190) at  
19 57:19-21 (citation omitted). Plaintiffs respond that even if  
20 Mr. Estrada cannot serve as a class representative, that  
21 would not "negate notice." Pls.' Reply (Doc. 207) at 25:21-  
22 22 (citation omitted). Hence, there is no basis for barring  
23 Ms. Martinez from serving as class representative even if,  
24 ultimately, Mr. Estrada cannot.

25 Plaintiffs have the sounder argument. In the first  
26 place, Bashas' primary authority, Robinson v. Sheriff of Cook  
27 County, 167 F.3d 1155 (7<sup>th</sup> Cir. 1999), as well as the two  
28

1 cases to which it cites,<sup>26</sup> are out of Circuit non-binding  
2 precedent. Second, all three cases are factually  
3 distinguishable, further diminishing their precedential  
4 value.<sup>27</sup> In Robinson, also a Title VII action, the defendant  
5 challenged Mr. Robinson's suitability as a class  
6 representative relying upon evidence of "his very poor  
7 employment record[.]" Robinson, 167 F.3d at 1156. On that  
8 basis, the district court rejected Robinson as the class  
9 representative, but allowed another individual "to join the  
10 suit as a plaintiff and take Robinson's place as class  
11 representative." Robinson, 167 F.3d at 1158; and 1156. When  
12 it was later discovered that that second individual had not  
13 filed an EEOC charge, the district court dismissed her claim  
14 and "disqualified her from serving as Robinson's successor as  
15 class representative. " Id. at 1156. The district court  
16 proceeded with the original named plaintiff's individual

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17  
18 <sup>26</sup> Wakeen v. Hoffman House, Inc., 724 F.2d 1238 (7<sup>th</sup> Cir. 1983); and  
Griffin v. Dugger, 823 F.2d 1476 (11<sup>th</sup> Cir. 1987).

19 <sup>27</sup> Wakeen involved a very different situation than the present case.  
20 In Wakeen, the Seventh Circuit held "that a class member who does not meet  
21 the procedural prerequisites for waging a Title VII suit may not use the  
22 guise of a motion to intervene to take over as the sole class  
23 representative for someone who initiates but is not legitimately able to  
24 continue a class action." Wakeen, 724 F.2d at 1246. In fact, in Byas v.  
Union Pacific R.R. Co., 2007 WL 1021976 (S.D.Ill. 2007), in a case not  
unlike the present one, the court held that "[t]he narrow holding of Wakeen  
does not apply in the instant case, where there are three named plaintiffs,  
one of whom has satisfied EEOC filing requirements." Id. at \*3 (emphasis  
added).

25 Griffin is likewise readily distinguishable from the present case.  
26 There, the Eleventh Circuit held that an intervening plaintiff could not  
invoke the single filing rule because he was "not sufficiently similarly  
27 situated[]" to the plaintiff who had timely filed an adequate EEOC  
complaint. Griffin, 823 F.2d at 1493. As discussed above, plaintiff  
Martinez's pay claim is sufficiently similar to plaintiff Estrada's.  
28 Moreover, unlike in Griffin, plaintiff Martinez is not seeking  
intervention.

1 claim, dismissing it after a bench trial.

2 On appeal, the plaintiffs argued, *inter alia*, that the  
3 class should have been certified with both of them as "class  
4 representatives irrespective of the deficiencies in their  
5 claims[.]" Id. at 1157. Affirming denial of the class  
6 certification, the Robinson Court found dispositive the fact  
7 that because Robinson had been rejected as the class  
8 representative, "there was no class action when [the second  
9 individual] was added to the suit." Id. at 1158. Expanding  
10 upon that reason, then Chief Judge Posner wrote:

11 There was no class representative who  
12 had dropped the baton for her to pick up;  
13 Robinson had never been approved as  
14 the class representative. [The second  
individual's] suitability as class  
representative had thus to be  
determined independently of him.

15 Id. Bashas' asserts that Ms. "Martinez would fail [such] an  
16 independent evaluation of her suitability to be class  
17 representative and should not be approved as one." Def.'s  
18 Resp. MCC (Doc. 190) at 58:11-12 (footnote omitted).

19 To support this assertion, Bashas' seizes upon the  
20 following language from Robinson:

21 In effect the appeal asks us to graft  
22 [the original class representative's]  
timely filing with the EEOC onto  
23 [the successor's] untimely but not-yet-  
shown-to-be-unmeritorious discrimination  
24 case to create a composite plaintiff to  
represent the class of blacks denied  
employment by the defendant. We cannot  
25 find any basis in law or good sense for  
such ghastly surgery. Neither plaintiff  
26 is a suitable class representative, and  
zero plus zero is zero.

27  
28 Id. at 58:2-5 (quoting Robinson, 167 F.3d at 1157) (other



1 citations omitted). Because Robinson is readily  
2 distinguishable, it does nothing to advance Bashas' argument,  
3 however.

4 The above quote was made in the context of "a named  
5 plaintiff whose claims were *particularly* deficient-in fact,  
6 they had been dismissed-and who was attempting to represent a  
7 class of people with potentially plausible claims." Norris-  
8 Wilson v. Delta-T Group, Inc., 270 F.R.D. 596, 605 (S.D.Cal.  
9 2010) (emphasis in original). That is not the situation  
10 here. There has been no showing at this juncture that Ms.  
11 Martinez's pay claim is "particularly deficient[.]" See id.  
12 What is more, Robinson supports the view that "[a] plaintiff  
13 should not be disqualified as a class representative simply  
14 because the "defendant *may* have good defenses" against that  
15 plaintiff." Perez v. State Farm Mut. Auto. Ins. Co., 2011 WL  
16 8601203, at \*2 (N.D.Cal. Dec. 7, 2011) (quoting  
17 Norris-Wilson, 270 F.R.D. at 605 (quoting in turn Robinson,  
18 167 F.3d at 1158) (emphasis in original). Nor should a named  
19 plaintiff be "disqualified as class representative if [s]he  
20 may fail to prove h[er] case[.]" Robinson, 167 F.3d at 1158  
21 (citation omitted) (emphasis in original). As the Robinson  
22 Court made clear, "[o]nly if a plaintiff's 'claim is a *clear*  
23 loser at the time [she] asks to be made class representative'  
24 should she be disqualified, because in that case, approving  
25 her 'as class representative can only hurt the class.'" Perez,  
26 2011 WL 8601203, at \*2 (quoting Robinson, 167 F.3d at  
27 1158) (emphasis in original)). There has been no such  
28 showing here.

1        Thus, the primary purpose of filing an EEOC charge --  
2 notice -- was afforded to Bashas', even though named  
3 plaintiff Martinez did not herself file such a charge. Mr.  
4 Estrada's EEOC charge, and others, "contain[ed] sufficient  
5 information to notify [Bashas'] of [its] potential liability  
6 and permit the EEOC to attempt informal conciliation of the  
7 claims before a lawsuit is filed." See Cal. Psychiatric  
8 Transitions, 644 F.Supp.2d at 1265 (citation omitted).  
9 Therefore, because "the purposes behind the filing  
10 requirement [we]re satisfied" in this case, "no injustice or  
11 contravention of congressional intent occurs by allowing [Ms.  
12 Martinez] [to] piggyback[]" on Mr. Estrada's charge. See  
13 Giumarra Vineyards, 2010 WL 3220387, at \*5 (quoting Thiessen,  
14 267 F.3d at 1110). In fact, because Mr. Estrada's EEOC  
15 charge and others, see Def.'s Resp. MCC (Doc. 190), exh. 40  
16 thereto, gave Bashas' notice of the pay claim against it, Ms.  
17 Martinez was not required to perform the "useless act" of  
18 filing her own separate charge. Giumarra Vineyards, 2010 WL  
19 3220387, at \*4 ("An act of filing an EEOC charge is deemed  
20 'useless' in situations in which the employer is already on  
21 notice that Plaintiffs may file discrimination claims, thus  
22 negating the need for additional filings.") (internal  
23 quotation marks and citation omitted). As discussed above,  
24 plaintiff Martinez can avail herself of the single filing  
25 rule and piggyback on the EEOC charges of other plaintiffs,  
26 such as Mr. Estrada.<sup>28</sup>

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27  
28        <sup>28</sup> This does not foreclose the possibility that if, at a later  
juncture, plaintiff Martinez's ability to represent the class is "found  
wanting, the court may seek a substitute representative or decertify the  
class." See U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 416, 100 S.Ct.

1        Accordingly, because plaintiff Martinez's pay claim is  
2 not subject to the defense of failure to exhaust her  
3 administrative remedies, that defense "cannot be a reason for  
4 finding that the typicality requirement is not satisfied."  
5 See Evon, 688 F.3d at 1030 (because defendant did "not  
6 qualify for the bona fide error defense as a matter of law,  
7 . . . whether [plaintiff's] claim is subject to this  
8 affirmative defense cannot be a reason for finding that the  
9 typicality requirement is not satisfied[]"). For that same  
10 reason, there is no "danger that absent class members will  
11 suffer" because plaintiff Martinez "is preoccupied with [a]  
12 defense[] unique to [her].'" See Ellis I, 657 F.3d at 984  
13 (quoting Hanon, 976 F.2d at 508 (other quotation marks and  
14 citation omitted). Finally, based upon the rulings herein,  
15 there also is no danger that plaintiff Martinez's failure to  
16 exhaust her administrative remedies will "create a  
17 distraction that will become a 'major focus of the  
18 litigation.'" See Ellis II, 285 F.R.D. at 534. In short,  
19 neither plaintiff Martinez's pay claim nor her failure to  
20 exhaust her administrative remedies are barriers to a finding  
21 of typicality. The issue still remains, though, as to  
22 whether plaintiffs Estrada and Martinez can meet Rule  
23 23(a)(3)'s typicality standard given what Bashas' describes  
24 as the lack of evidence of a shared "common experience[.]"  
25 See Def.'s Resp. MCC (Doc. 190) at 45:9.

26        . . .

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27  
28        1202, 63 L.Ed.2d 479 (1980) (citations omitted) ("If the named plaintiff's  
own claim becomes moot after certification, the court can re-examine his  
ability to represent the interest of the class members.")

**b. Gonzalo Estrada and Aurliea Martinez**

Typicality, like commonality, "serve[s] as [a] guidepost[] for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Dukes, 131 S.Ct. at 2511, n. 5 (quoting Falcon, 457 U.S. at 157, n. 13, 102 S.Ct. 2364). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Ellis I, 657 F.3d at 984 (internal citation and quotation marks omitted). Put differently, under Rule 23(a)(3)'s "permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9<sup>th</sup> Cir. 1998).

That test for typicality is easily met here, despite Bashas' contrary protestations. Plaintiff Estrada is a Hispanic former hourly Food City employee, and plaintiff Martinez is a Hispanic current Food City hourly employee.<sup>29</sup>

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<sup>29</sup> Ms. Martinez's declaration is from 2004. Not having been advised to the contrary, the court presumes she is still a Food City employee. At the same time, however, the court is well aware that "[c]lass certification is not immutable, and class representative status could be withdrawn or modified if at any time the representatives could no longer protect the interests of the class." Cummings v. Connell, 316 F.3d 886, 896 (9<sup>th</sup> Cir. 2003) (citation omitted); see also Lopez v. San Francisco Unified School District, 2003 WL 26114018, at \*2 (N.D.Cal. Sept. 8, 2003) (citation omitted) ("[T]he Court has a duty throughout the litigation to stringently examine the adequacy of class representatives.")

Both allege that they were paid less than their Caucasian counterparts at A.J.'s and Bashas' for performing the same work. See FAC (Doc. 116) at ¶ 8; and Def.'s Resp. MCC (Doc. 190), exh. 40 (Estrada EEOC charge) thereto. The putative class, comprised of "all past, present and future Latino employees of" defendant alleges that same, identical injury. See FAC (Doc. 116) at 3:19-20, ¶ 10. Further, as discussed with respect to commonality, this lawsuit is "based on conduct which is *not* unique to the named plaintiffs" - Bashas' wage scales. See Ellis I, 657 F.3d at 984 (internal quotation marks and citation omitted). Lastly, "other class members have been injured by" those wage scales because, as Bashas' conceded, under its wage scales "Hispanic employee hourly rates were lower in similar jobs[,]"<sup>30</sup> at least "during the period 1998-2000[.]" See Parra II, 536 F.3d at 979. Thus, as just shown, Bashas' contention that the alleged discrimination has not "*manifested itself . . . in the same general fashion[]*" borders on the frivolous insofar as the equal pay claim is concerned. See Def.'s Resp. MCC (Doc. 190) at 45:9; and 45:26-27 (quoting Falcon, 457 U.S. at 159 n. 15, 102 S.Ct. 2364) (emphasis added by Bashas').

An additional basis for finding typicality in this action is that the named plaintiffs' pay claims "rest on legal theories that apply to all putative class members." See Wood

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<sup>30</sup> As previously discussed, this is one of three concessions which the Ninth Circuit found highly pertinent with respect to commonality. However, because Rule 23(a)'s commonality and typicality requirements "*tend to merge[]*" Dukes, 131 S.Ct. at 2551 (quoting Falcon, 457 U.S. at 157 n. 13, 102 S.Ct. 2364)), this concession also heavily bears on the typicality inquiry.

1 V. Betlach, 286 F.R.D. 444, 448 (D.Ariz. 2012) (citing Cohen  
2 v. Chicago Title Ins. Co., 242 F.R.D. 295, 299 (E.D.Pa. 2007)  
3 ("[E]ven relatively pronounced factual differences will  
4 generally not preclude a finding of typicality where there is  
5 a strong similarity of legal theories.'" ) (citation omitted);  
6 Mitchell-Tracey v. United Gen. Title Ins. Co., 237 F.R.D.  
7 551, 558 (D.Md. 2006) ("'[W]hile claims of particular  
8 individuals may vary in detail from one to another, the  
9 collective claims focus on particular policies applicable to  
10 each class member thereby satisfying the typicality  
11 requirement of Rule 23(a).'" ) (other citation and footnote  
12 omitted). Because the named plaintiffs' pay claims rest on  
13 the same legal theories, and because those claims are  
14 reasonably co-extensive with the absent class members, they  
15 have cleared the typicality hurdle. See Gong-Chun v. Aetna  
16 Inc., 2012 WL 2872788, at \*8 (E.D.Cal. July 12, 2012)  
17 (typicality shown where "Plaintiffs' claims are 'co-  
18 extensive' with the other Class Members, as Plaintiffs and  
19 the absent Class Members were all Defendants' employees who  
20 were paid under the same pay practices and worked under the  
21 same company-wide employment policies[]"); see also Marin v.  
22 Evans, 2008 WL 2937424, at \*4 (E.D. Wash. July 23, 2008)  
23 (finding typicality where the "named Plaintiffs were  
24 employees of [defendant company], and their claim is that  
25 they were allegedly injured by the Illegal Hiring Scheme by  
26 reduction in pay, which is typical of the claims that would  
27 be asserted by all members of the purported class[]").  
28 . . .

#### 4. Adequacy

The last Rule 23(a) hurdle plaintiffs must clear is subsection four, which provides that "the representative parties will fairly and adequately protect the interests of the class."<sup>31</sup> Fed.R.Civ.P. 23(a)(4). This requirement "satisf[ies] due process concerns[]" in that "absent class members must be afforded adequate representation before entry of a judgment which binds them." Hanlon, 150 F.3d at 1020 (citing Hansberry v. Lee, 311 U.S. 32, 42-43, 61 S.Ct. 115, 85 L.Ed. 22 (1940)). The adequacy-of-representation requirement "also raises concerns about the competency of class counsel and conflicts of interest." See Dukes, 131 S.Ct. at 2551 n. 5 (citation and internal quotation marks omitted). Therefore, "[a]dequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." Ellis I, 657 F.3d at 985 (citation omitted). Consequently, "[t]o determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf

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<sup>31</sup> "Since the revision of Rule 23 in December 2003, the adequacy of class counsel is now evaluated pursuant to Rule 23(g). 'Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the class certification process.'" Parra I, 2005 WL 6182338, at \*18 n. 33 (quoting Fed.R.Civ.P. 23 Advisory Committee note).

1 of the class?" Id. (quoting Hanlon, 150 F.3d at 1020).  
2 Here, as explained below, the court answers the first  
3 question in the negative, and the second, in the affirmative.  
4 As a result, it finds that named plaintiffs Estrada and  
5 Martinez are adequate class representatives with respect to  
6 the pay claim.

7 Plaintiffs Estrada and Martinez maintain that they are  
8 adequate class representatives because they are "able and  
9 willing to represent the class[,] and they have the "same"  
10 interests as those of the potential class members in that  
11 they are seeking to prove, *inter alia*, that Bashas' "pay  
12 policies . . . discriminate against Hispanic[] workers."  
13 Pls.' MCC (Doc. 159) at 22:10-13 (citations and footnote  
14 omitted). Essentially, Bashas' counters that the named  
15 plaintiffs do not have the same interests as the putative  
16 class because they are "puppets" of the United Food and  
17 Commercial Workers Union ("the Union"), having "private  
18 ulterior motives[.]" Def.'s Resp. MCC (Doc. 190) at 48:1-21;  
19 47:7 (emphasis omitted).

20 This ulterior motives argument can be resolved with  
21 dispatch because this court already addressed it in Parra I,  
22 albeit in the context of the working conditions claim. The  
23 differing nature of the claim does not change the result  
24 though. The record is the same; the arguments are the same;  
25 and the court's view is the same. It is "not convinced that  
26 the named plaintiffs are inadequate due to [Bashas']  
27 allegations of ulterior motives." Parra I, 2005 6182338, at  
28 \*18. It is necessary, though, to address Bashas' remaining



1 challenges, not specifically addressed in Parra I, as to the  
2 adequacy of named plaintiffs Estrada and Martinez to serve as  
3 class representatives.

4 **a. Gonzalo Estrada**

5 **i. "Individual Claim"**

6 Bashas' claims that plaintiff Estrada is not an adequate  
7 class representative because he has "no individual claim fit  
8 to pursue[.] Def.'s Resp. MCC (Doc. 190) at 56:6. This  
9 court's finding in Parra I that plaintiff Estrada  
10 "articulated [a] claim for pay disparity" undercuts that  
11 assertion. See Parra I, 2005 WL 6182338, at \*17.

12 There is likewise no merit to Bashas' claim that Mr.  
13 Estrada is not an adequate class representative because "he  
14 is involved in this suit, not for what happened to him, but  
15 for what happened to others." Def.'s Resp. MCC (Doc. 190) at  
16 54:10-11. The basis for this assertion is the following  
17 snippet from Mr. Estrada's deposition:

18 Q. And in this lawsuit you're not  
19 involved in it because of what  
happened to you?

20 A. No.

21 Q. You're standing up for other employees?

22 A. Yes.

23 Id. at 54:12-16 (citing exh. 11 thereto 54:4-8) (footnote  
24 omitted). If anything, it strikes the court that a  
25 willingness to "stand[] up for other employees" is further  
26 indicia that plaintiff Estrada is a proper class  
27 representative. See id. This is especially so given that Mr.  
28 Estrada, like Ms. Martinez, has declared his "ability and

1 willingness to represent the class." See Parra I, 2005 WL  
 2 6182338, at \*18 (citations omitted). Taking the record as a  
 3 whole, the court finds unconvincing Bashas' argument that  
 4 plaintiff Estrada is not an adequate class representative  
 5 because he is not asserting an individual claim.

6 **ii. Former Employee**

7 Bashas' also endeavors to show that Mr. Estrada and the  
 8 potential class members do not have a shared interest because  
 9 he is a former Food City employee whose circumstances are  
 10 "vastly different" than those of the putative class. Def.'s  
 11 Resp. MCC (Doc. 190) at 54:27, n. 38. One such difference is  
 12 Mr. Estrada's lack of "interest in returning to Food City,"<sup>32</sup>  
 13 which Bashas' argues renders "moot . . . the issue of  
 14 injunctive relief[.]" Id. Disregarding the nature of the  
 15 relief sought, plaintiffs respond that "[f]ormer employees may  
 16 represent current employees in a class action[.]" Pls.' Reply  
 17 (Doc. 207) at 24:1 (citations omitted).

18 These arguments are imported directly from the 2004 class  
 19 certification motion.<sup>33</sup> Both the law, and the plaintiffs'

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20  
 21 <sup>32</sup> To support this assertion, Bashas' is relying upon an excerpt  
 22 from Mr. Estrada's deposition. See Def.'s Resp. MCC (Doc. 190) at 54:26  
 23 (citing "Estrada Depo p. 44 ll. 10-12"). There is no reason to doubt the  
 24 veracity of that statement. At the same time though, there is no way to  
 25 ascertain its accuracy because the excerpts provided in connection with the  
 supplemental briefs did not include that page. That is also the case for  
 the remaining excerpts from Mr. Estrada's deposition which Bashas' cites in  
 footnote 38 of its response to the motion for class certification. Such  
 inadvertent omissions are always bothersome, but they were all the more so  
 here where the combined briefs and record are in the range of 3,000 pages.

26  
 27 <sup>33</sup> Devoting its post-Dukes briefs exclusively to commonality and  
 28 typicality, Bashas' omitted any discussion of adequacy. In their post-  
Dukes supplemental brief, plaintiffs direct the court to their "original  
 briefing" as to adequacy, among other things. See Pls.' Supp. Br. (Doc.  
 302) at 19:25-26. Therefore, because on remand this court must consider  
 whether each of the threshold Rule 23(a) requirements is met as to the

position along with it, have changed since that time however. In 2004, plaintiffs were relying upon Rule 23(b)(2)<sup>34</sup> as the basis for class certification of both the equal pay and working conditions claims. In fact, in Parra I, this court certified a class under that Rule only as to working conditions. In the intervening years, in Dukes the Supreme Court unanimously held that "individualized monetary claims belong in Rule 23(b)(3)"<sup>35</sup> - not in Rule 23(b)(2). See Dukes, 131 S.Ct. at 2558. Consequently, in light of Dukes, now plaintiffs are seeking class certification of the equal pay claim strictly on the basis of Rule 23(b)(3).

That shift takes the issue of injunctive relief

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equal pay claim, necessarily it has resorted to the parties' original, pre-Dukes' arguments.

<sup>34</sup> That Rule provides:

A class action may be maintained if Rule 23(a) is satisfied and if: . . .

the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]

Fed.R.Civ.P. 23(b)(2).

<sup>35</sup> In relevant part, that Rule reads as follows:

A class action may be maintained if Rule 23(a) is satisfied and if:

the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Fed.R.Civ.P. 23(b)(3).

1 completely out of the equation insofar as the pay claim is  
2 concerned. Not only that, if ultimately plaintiffs were to  
3 prevail on their pay claim, Mr. Estrada, as well as other  
4 putative class members (current and former hourly Food City  
5 employees), would be entitled to recover monetary damages,  
6 despite the fact they are no longer employed there. See  
7 Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81, 87  
8 (S.D.N.Y. 2001) (in analyzing adequacy, finding that  
9 "[b]ecause this is a suit primarily for money damages stemming  
10 from past actions, it is not relevant that only one of the  
11 named Plaintiffs is still employed as a delivery person[]").  
12 The Supreme Court in Dukes recognized as much, stressing that  
13 "if a backpay action were properly certified for class  
14 treatment under (b)(3), the ability to litigate a plaintiff's  
15 backpay claim as part of the class would not turn on the  
16 irrelevant question whether [h]e is still employed at [the  
17 defendant store]." Dukes, 131 S.Ct. at 2560 (emphasis in  
18 original). Thus, plaintiff Estrada's former employee status  
19 does not weaken a finding that he is an adequate class  
20 representative insofar as the plaintiffs are seeking monetary  
21 damages for their equal pay claim.<sup>36</sup>

22 The same is true with respect to Bashas' litany of the  
23

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24 <sup>36</sup> By curtailing the relief which they are seeking as to their pay  
25 claim, plaintiffs have negated altogether Bashas' argument that as a former  
26 employee Mr. Estrada is an inadequate class representative because he lacks  
27 a shared interest with the class as to injunctive relief. If plaintiffs  
28 were still seeking such relief, the result would be different, see Ellis I,  
657 F.3d at 986 (vacating district court's finding that the former  
employees could adequately represent that class because they had "no  
incentive to pursue injunctive relief[,] and hence they did not "share an  
interest with class members whose primary goal [wa]s to obtain injunctive  
relief[]" under Rule 23(b)(2)), but the fact remains that they are not.  
Plaintiffs' equal pay claim seeks only monetary damages.

other "vastly different circumstances" which allegedly are indicative of a conflict of interest, such that Mr. Estrada would not adequately represent the class. See Def.'s Resp. MCC (Doc. 190) at 54, n. 38. Bashas' does not explain, and the court fails to see how, Estrada's termination, his supposed lack of interest in working at A.J.'s or Bashas', or, in the grocery industry generally, and his doubling in pay,<sup>37</sup> render him an inadequate class representative. Moreover, plaintiff Estrada is seeking the same relief as the putative class - monetary damages. His claimed injury also is the same as the putative class - as a Hispanic Food City hourly employee, allegedly he received less pay than his Caucasian counterparts at A.J.'s and Bashas'. Consequently, not only is there a "sharing of interest" between plaintiff Estrada and the potential class members, but there is an "absence of antagonism between" them. See Ellis I, 657 F.3d at 985 (citation omitted). Accordingly, plaintiff Estrada is an adequate class representative pursuant to Rule 23(a)(4), insofar as the pay claim is concerned.

. . .

**b. Aurelia Martinez**

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<sup>37</sup> Observing that plaintiff Estrada's pay "nearly doubled," Bashas' strongly implies that that factor militates against a finding that he is an adequate representative. See Def.'s Resp. MCC (Doc. 190) at 54:24, n. 38 (citing "Estrada Depo p. 7 l.21 - p. 8 ll.14"). This is one of the deposition excerpts, mentioned earlier, which was not provided to the court. In this instance, however, based upon Mr. Estrada's declaration, the court was able to easily corroborate that his pay did nearly double during his tenure at Food City. See Estrada Decl'n (Doc. 176) at 3:7-14, ¶ 8. At the end of the day that is immaterial though if, as plaintiffs allege, Mr. Estrada's Caucasian counterparts at Bashas' and A.J.'s were paid more for doing the same or similar work. Therefore, this asserted doubling of pay does not mean that Estrada would be an inadequate class representative.

1 Bashas' advances two other equally unpersuasive theories  
2 as to why Ms. Martinez in particular is not an adequate class  
3 representative. The first is that allegedly her claims are  
4 weak, and the second is her credibility.

5 **i. Strength of Claims**

6 Bashas' disputes the legitimacy and sufficiency of Ms.  
7 Martinez's claims because in June 1999, when she and her  
8 husband filed for bankruptcy, she did not list her potential  
9 claims in this lawsuit as a contingent and unliquidated claim  
10 on their Schedule B form. Ms. Martinez signed the declaration  
11 accompanying that Schedule under penalty of perjury. See  
12 Def.'s Resp. MCC (Doc. 190) at 62:9-10. Further, between  
13 October, 2002, when Ms. Martinez and her husband were  
14 discharged in bankruptcy, and the April 4, 2002, commencement  
15 of this action, Bashas' points out that Ms. Martinez did not  
16 amend Schedule B to include any potential claims herein.  
17 These omissions, Bashas' contends, "suggest[] either that (1)  
18 [Ms. Martinez] has no legitimate claims, or (2) she knew that  
19 any potential claim had no value." Id. at 61:15-16; 62:18-20.  
20 The court declines to make either inferential leap, especially  
21 when there is no factual or legal basis for so doing.

22 Ms. Martinez did not become a named plaintiff until more  
23 than four and a half years after she and her husband filed for  
24 bankruptcy. Therefore, the court agrees with plaintiffs that  
25 it is not surprising that Ms. Martinez did not mention this  
26 lawsuit during the bankruptcy. Furthermore, during the six  
27 month overlap of the pendency of this action and the Martinez  
28 bankruptcy, Ms. Martinez's involvement in this action was  
peripheral. She was simply a member of a *proposed*, but

1   uncertified, class. Until a decision on class certification,  
2   including the scope of the class, Ms. Martinez had no way of  
3   knowing whether she would actually become a class member. In  
4   fact, the possibility of Ms. Martinez becoming a named  
5   plaintiff did not occur until December 4, 2003, more than a  
6   year after the bankruptcy discharge, upon the filing of a  
7   motion to amend the complaint to include Ms. Martinez as a  
8   named plaintiff. And, it was not until March 11, 2004, that  
9   the FAC, adding Ms. Martinez as a named plaintiff, actually  
10   was filed. This particular factual situation does not give  
11   this court any reason to doubt the adequacy of Ms. Martinez as  
12   a class representative.

13       Continuing to question the strength of Ms. Martinez's  
14   claims, because she did not disclose them during her  
15   bankruptcy, Bashas' argues that such "[w]eakness or  
16   illegitimacy in a proposed class representative's case is an  
17   "‘independent reason to doubt the adequacy of [her]  
18   representation.’" Def.'s Resp. MCC (Doc. 190) at 63:7-8  
19   (quoting Robinson, 167 F.3d at 1157) (other citations  
20   omitted). This argument is unpersuasive.

21       In the first place, this court agrees that "[t]he  
22   adequacy prong of Rule 23(a) isn't the place to try to  
23   litigate the merits of a case." Norris-Wilson, 270 F.R.D. at  
24   605-06. "In fact, 'nothing in either the language or history  
25   of Rule 23 . . . gives a court any authority to conduct a  
26   preliminary inquiry into the merits of a suit in order to  
27   determine whether it may be maintained as a class action.'"  
28

1 Id. (quoting United Steel Workers, 593 F.3d at 808  
2 (alterations in original) (other citations omitted)).

3 Second, Bashas' main authority, Robinson, is non-binding  
4 Seventh Circuit precedent and distinguishable in one very  
5 critical respect. There, a correction officer applicant  
6 brought a Title VII putative class action. Challenging that  
7 applicant's adequacy as a class representative, the defendant  
8 employer came forth with evidence showing that that applicant  
9 "had been turned down because of his very poor employment  
10 record, which among other things contained an unexplained 27-  
11 month gap between jobs." Robinson, 163 F.3d at 1156. Due to  
12 that employment history, the district court denied class  
13 representative status to that applicant. Holding, *inter alia*,  
14 that class certification was properly denied, the Robinson  
15 Court reasoned:

16 [I]f when class certification is  
17 sought it is already apparent --  
18 as it was here because of Robinson's  
19 employment history as shown on the  
20 application that he submitted to  
the Sheriff's office -- that the class  
representative's claim is extremely  
weak, this is an independent reason to  
doubt the adequacy of his representation.

21 Id. at 1157 (citations omitted). The Court further reasoned,  
22 that if a named plaintiff's "claim is a clear loser at the  
23 time he asks to be made class representative, then approving  
24 him as a class representative can only hurt the class." Id.  
25 at 1158 (emphasis in original).

26 In sharp contrast to Robinson, the asserted weakness in  
27 Ms. Martinez's claims -- her failure to disclose them during  
28 bankruptcy -- has nothing whatsoever to do with the merits.



1 According to Bashas', Ms. Martinez's claims herein are weak  
2 because she did not disclose them during bankruptcy. Bashas'  
3 does not assert, and it would be hard-pressed to, that Ms.  
4 Martinez's pay claim is "extremely weak," much less a "clear  
5 loser" on the merits. Thus, Ms. Martinez's failure to  
6 disclose her potential claims is not "an independent reason to  
7 doubt the adequacy of her representation." See Robinson, 167  
8 F.3d at 1156 (citations omitted).

9 **ii. Credibility**

10 Emphasizing that Ms. Martinez signed the declaration  
11 accompanying the Schedule B Form under penalty of perjury,  
12 Bashas' strongly implies that Ms. Martinez has credibility  
13 issues which impact her adequacy as a class representative.  
14 "[C]redibility is a relevant consideration with respect to the  
15 adequacy analysis[.]" Keegan, 2012 WL 2250040, at \*14  
16 (internal quotation marks and citations omitted). At the same  
17 time, however, "credibility problems must relate to issues  
18 directly relevant to the litigation or there are confirmed  
19 examples of dishonesty, such as a criminal conviction for  
20 fraud." Id. (internal quotation marks and citations omitted).  
21 Thus, even if the court were to find, which it does not, that  
22 Ms. Martinez's credibility is at issue because she did not  
23 disclose this lawsuit during bankruptcy, such credibility  
24 issue would not impact her ability to serve as a class  
25 representative.

26 To this point, the focus has been upon the first prong of  
27 adequacy - the absence of antagonism and sharing of interests  
28 between the named plaintiffs and the absentee class members.

1 As the foregoing discussion shows, there has been no showing  
2 that either plaintiffs Estrada or Martinez have any conflicts  
3 with putative class members. That is only the first prong of  
4 the adequacy test, however. As to the second, "will the named  
5 plaintiffs and their counsel prosecute the action vigorously  
6 on behalf of the class[,]" Ellis I, 657 F.3d at 985 (internal  
7 quotation marks and citation omitted), in Parra I this court  
8 found that they would by implication. See Parra I, 2005 WL  
9 6182338, at \*20 - \*22. To be sure, at that time, the court  
10 was discussing appointment of class counsel pursuant to  
11 Fed.R.Civ.P. 23(g), and not adequacy under Rule 23(a)(4).  
12 There is no reason to revisit the issue of whether class  
13 counsel will vigorously prosecute this action, however,  
14 because Bashas' has not raised any other issues in that regard  
15 beyond those raised and resolved in Parra I.

16 Additionally, "[i]n assessing whether class  
17 representatives and their counsel will vigorously prosecute a  
18 class action litigation, courts may consider the actual  
19 progress of the proceedings to that point." Buckland v. Maxim  
20 Healthcare Services, Inc., 2012 WL 3705263, at \*6 (C.D.Cal.  
21 Aug. 27, 2012) (internal quotation marks and citation  
22 omitted). Although this action has not progressed beyond the  
23 class certification stage, it is not due to the failure of  
24 plaintiffs' counsel to vigorously prosecute this action. In  
25 fact, their continued involvement at every step of this rather  
26 complicated and protracted litigation, makes it abundantly  
27 clear that despite the passage of time, they remain willing  
28 and able to vigorously prosecute this action.

1 In short, as with the other Rule 23(a) requirements, the court  
2 finds that the adequacy requirement has been satisfied.  
3 Having shown that all four elements of Rule 23(a) are met as  
4 to the pay claim, the next issue is whether this action  
5 "fit[s] into one of the three categories described in  
6 subdivision (b)[]" of Rule 23. Shady Grove Orthopedic  
7 Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S.Ct.  
8 1431, 1437, 176 L.Ed.2d 311 (2010) (internal quotation marks  
9 omitted)).

10 **B. Fed.R.Civ.P. 23(b)(3)**

11 As previously discussed, after Dukes, plaintiffs are  
12 seeking class certification of their pay claim solely pursuant  
13 to Rule 23(b)(3). That Rule, "as an adventuresome innovation,  
14 is designed for situations in which class-action treatment is  
15 not as clearly called for." Comcast, 133 S.Ct. at 1432  
16 (internal quotation marks and citations omitted). "That  
17 explains Congress's addition of procedural safeguards for  
18 (b)(3) class members beyond those provided for (b)(1) or  
19 (b)(2) class members (e.g., an opportunity to opt out), and  
20 the court's duty to take a "'close look'" at whether common  
21 questions predominate over individual ones." Id. (quoting  
22 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615, 117 S.Ct.  
23 2231, 138 L.Ed.2d 689 (1997)).

24 Certification pursuant to Rule 23(b)(3) "is appropriate  
25 'whenever the actual interests of the parties can be served  
26 best by settling their differences in a single action.'" Hanlon,  
27 150 F.3d at 1022 (quoting 7A Charles Alan Wright,  
28 Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure

§ 1777 (2d ed.1986) ("Wright & Miller"). The "only prerequisites" for certification under Rule 23(b)(3) "are that 'the questions of law or fact common to class members predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" Dukes, 131 S.Ct. at 2558 (quoting Fed.R.Civ.P.23(b)(3)). The questions of predominance and superiority "are interrelated because '[i]mplicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy.'" York v. Starbucks Corp., 2011 WL 8199987, at \*31 (C.D.Cal. Nov. 23, 2011) (quoting, *inter alia*, Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9<sup>th</sup> Cir. 1996)).

### **1. Predominance**

"[T]here is substantial overlap between" the test for commonality under Rule 23(a)(2) and the predominance test under 23(b)(3). Wollin v. Jaguar Land Rover North America LLC, 617 F.3d 1168, 1172 (9<sup>th</sup> Cir. 2010). However, "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." Comcast, 133 S.Ct. at 1432 (citing Amchem, 521 U.S. 591, 623-24, 117 S.Ct. 2231). Consequently, "the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3)." Hanlon, 150 F.3d at 1022. The predominance inquiry "trains on legal or factual questions that qualify each class member's case as a genuine controversy." Amchem, 521 U.S. at 625, 117 S.Ct. 2231. In contrast to Rule 23(a)(2), "[t]he predominance analysis under

1 Rule 23(b)(3) focuses on the relationship between the common  
2 and individual issues in the case and tests whether proposed  
3 classes are sufficiently cohesive to warrant adjudication by  
4 representation." Wang, 709 F.3d at 835 (internal quotation  
5 marks and citation omitted). As the Supreme Court recently  
6 emphasized in Amgen, "Rule 23(b)(3) requires a showing that  
7 questions common to the class predominate, not that those  
8 questions will be answered, on the merits, in favor of the  
9 class." Amgen, 133 S.Ct. at 1191 (emphasis in original).  
10 Hence, "the office of a Rule 23(b)(3) certification ruling is  
11 not to adjudicate the case; rather, it is to select the  
12 metho[d] best suited to adjudication of the controversy fairly  
13 and efficiently." Id. (internal quotation marks omitted).

14 The Ninth Circuit recognizes that "'there is clear  
15 justification for handling the dispute on a representative  
16 rather than an individual basis' if 'common questions present  
17 a significant aspect of the case and they can be resolved for  
18 all members of the class in a single adjudication[.]'" Mazza,  
19 666 F.3d at 589 (quoting, *inter alia*, Hanlon, 150 F.3d at  
20 1022). In contrast, "'if the main issues in a case require  
21 the separate adjudication of each class member's individual  
22 claim or defense, . . . , a Rule 23(b)(3) action would be  
23 inappropriate.'" Keegan, 284 F.R.D. at 256 (quoting, *inter*  
24 *alia*, Zinser v. Accufix Research Institute, Inc., 253 F.3d  
25 1180, 1186 (9<sup>th</sup> Cir.), amended by 273 F.3d 1266 (9<sup>th</sup> Cir.  
26 2001)). "This is because, *inter alia*, the economy and  
27 efficiency of class action treatment are lost and the need for  
28 judicial supervision and the risk of confusion are

1 magnified.'" Id. (quoting Zinser, 253 F.3d at 1186). "Courts  
2 must thus separate the issues subject to 'generalized proof'  
3 from those subject to 'individualized proof' to determine  
4 whether plaintiffs have satisfied the predominance  
5 requirement." Ellis II, 285 F.R.D. at 537 (citation omitted).

6 The predominance analysis "'begins . . . with the  
7 elements of the underlying cause of action.'" Stearns, 655  
8 F.3d at 1020 (quoting Erica P. John Fund, Inc., v. Halliburton  
9 Co., 563 U.S. ----, ----, 131 S.Ct. 2179, 2184, 180 L.Ed.2d 24  
10 (2011)). Here, plaintiffs are alleging that "Bashas' two-  
11 tiered wage policy constitutes disparate treatment and/or has  
12 had a disparate impact on Hispanic Food City workers in  
13 violation of Title VII and Section 1981." Pls.' Supp. Br.  
14 (Doc. 302) at 21:3-5. Resolution of that "central *liability*  
15 issue[] . . . involves no individual questions[,]" plaintiffs  
16 argue. Id. at 21:2-3; 21:5 (emphasis in original).  
17 Plaintiffs further argue that the "only individual  
18 determination to be made" -- the amount of back pay -- "does  
19 not defeat class certification." Id. at 21:6; 22:1 (citing  
20 Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1089  
21 (9<sup>th</sup> Cir. 2010)). And, as plaintiffs are quick to point out,  
22 the Ninth Circuit in Parra II rejected Bashas' argument that  
23 "[t]he claimed difficulties in the calculations of damages, as  
24 they affected the various class members . . . preclude[d]  
25 class certification." Parra II, 536 F.3d at 979. What is  
26 more, just recently, the Ninth Circuit reaffirmed its long-  
27 held view that "'[t]he amount of damages is invariably an  
28 individual question and does not defeat

1 class action treatment.'" Leyva v. Medline Industries Inc.,  
2 2013 WL 2306567, at \*3 (9<sup>th</sup> Cir. May 28, 2013) (quoting  
3 Blackie v. Barrack, 524 F.2d 891, 905 (9<sup>th</sup> Cir. 1975) (other  
4 citation omitted).

5 Perhaps because the Supreme Court in Dukes clarified that  
6 "individualized monetary claims[,] " such as plaintiffs' back  
7 pay claims herein, "belong in Rule 23(b)(3)[,]" Dukes, 131  
8 S.Ct. at 2558, Bashas' agrees that individual damage issues  
9 alone do not defeat class certification under that Rule. See  
10 Stearns, 655 F.3d at 1026 (citing Yokoyama, 594 F.3d at 1094)  
11 ("We have held that the mere fact that there might be  
12 differences in damage calculations is not sufficient to defeat  
13 class certification.") Nonetheless, Bashas' insists that  
14 plaintiffs have not established predominance because  
15 "[q]uestions regarding liability would require . . . highly  
16 fact-specific inquiries regarding whether or not the  
17 Plaintiffs' alleged discriminatory pay . . . w[as] the result  
18 of discrimination or some other, non-discriminatory factor."  
19 Def.'s Supp. Br. (Doc. 301) at 19:26-20:1. This argument is  
20 based upon two faulty assumptions - one pertaining to the  
21 nature of plaintiffs' pay claim and the other to the proof in  
22 that regard.

23 Although plaintiffs have explicitly renounced their  
24 Subjective Placement claim, Bashas' still insists that  
25 plaintiffs' pay claim involves "subjective decision-making[]"  
26 where "individual store managers, acting at their own  
27 discretion, decided where to place employees on the wage  
28 scale." Def.'s Resp. (Doc. 304) at 7:19 (citations omitted);

1 6:22-23 (emphasis added). From Bashas' standpoint, the  
2 exercise of that discretion "set the employees' wage history  
3 in motion, and it is a key issue in this case." Id. at 6:23-  
4 25. Characterizing plaintiffs' pay claim in that way, Bashas'  
5 posits that defending such a claim would involve assessing  
6 "numerous . . . subjective decisions regarding placement of  
7 members, in the proposed class, on the pay scales." Id. at  
8 8:13-15. Such an assessment is incompatible with a finding of  
9 predominance in Bashas' view.

10 Perhaps Bashas' argument would have some validity if  
11 plaintiffs were still pursuing their Subjective Placement  
12 claim, but they are not. At the risk of repetition,  
13 plaintiffs' pay claim is based strictly on Bashas' wage  
14 scales, and is independent of their foregone Subjective  
15 Placement claim. Thus, the ostensibly individualized nature  
16 of that Subjective Placement claim is not germane to the issue  
17 of whether common issues predominate with respect to  
18 plaintiffs' pay claim, predicated solely upon Bashas' wage  
19 scales.

20 The second faulty assumption under which Bashas' is  
21 operating is that "[p]laintiffs have not produced any actual  
22 evidence that Bashas' operated under a single, common policy  
23 of discrimination." Def.'s Supp. Br. (Doc. 301) at 20:2-3.  
24 As discussed with respect to commonality, plaintiffs have  
25 identified a specific employment policy, *i.e.*, Bashas' wage  
26 scales, which have caused a pay disparity. See Ellis II, 285  
27 F.R.D. at 538 (finding predominance where "[p]laintiffs . . .  
28 presented significant proof that Costco operates under a



1 common, nationwide promotion system for [certain] positions  
 2 and have identified specific employment practices that have  
 3 caused a disparity in promotions[.]"). Further, because  
 4 plaintiffs contend that Bashas' wage scales are  
 5 "discriminatory, both under a disparate treatment and a  
 6 disparate impact theory[,] . . . [r]esolution of Plaintiffs'  
 7 challenge to those [wage scales] will resolve significant  
 8 issues with respect to the class as a whole and this dwarfs  
 9 the individualized issues[.]" See *id.* (citing *Stinson v. City*  
 10 *of New York*, 282 F.R.D. 360, 382 (S.D.N.Y. 2012) ("`Class-wide  
 11 issues predominate if resolution of some of the legal or  
 12 factual questions that qualify each class member's case as a  
 13 genuine controversy can be achieved through generalized proof,  
 14 and if these particular issues are more substantial than the  
 15 issues subject only to individualized proof.'" (quoting *Moore*  
 16 *v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002))).

17 More closely considering plaintiffs' specific theories of  
 18 liability, disparate treatment and disparate impact, yields  
 19 the same result. On that point, the court finds persuasive  
 20 the reasoning in *Ellis II*. There, with respect to the  
 21 disparate treatment claim, the court explained:

22 whether Defendant has engaged in a  
 23 pattern or practice of discrimination  
 24 such that all class members are entitled  
 25 to a presumption of discrimination under  
 26 the *Teamsters* method of proof<sup>38</sup> is a common

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27 <sup>38</sup> "As the Supreme Court reaffirmed in *Dukes*, pattern-or-practice  
 28 cases alleging disparate treatment under Title VII typically follow a  
 bifurcated, burden-shifting structure laid out by *Int'l Broth. of Teamsters*  
*v. United States*, 431 U.S. 324 (1977):

28 We have established a procedure for trying  
 pattern-or-practice cases that gives effect to  
 [Title VII's] statutory requirements. When the

1 issue subject to classwide resolution. This  
 2 'pattern and practice question predominates  
 3 because it has a direct impact on every  
 4 class member's effort to establish liability  
 5 and on every class member's entitlement  
 6 to . . . monetary relief.' Ingram v. The  
 7 Coca-Cola Co., 200 F.R.D. 685, 699  
 8 (N.D.Ga. 2001) (certifying (b)(3) class of  
 9 plaintiffs alleging a pattern or practice  
 10 of race discrimination in employment under  
 11 Teamsters framework); see also Williams  
 12 v. Mohawk Indus., Inc., 568 F.3d 1350,  
 13 1357 (11<sup>th</sup> Cir. 2009) ("Common issues of fact  
 14 and law predominate if they ha[ve] a direct  
 15 impact on every class member's effort to  
 16 establish liability and on every class  
 17 member's entitlement to injunctive  
 18 and monetary relief.") (internal citations  
 19 and quotation marks omitted).

20 Ellis II, 285 F.R.D. at 538 (footnote added). The Ellis II  
 21 court similarly explained as to plaintiffs' disparate impact  
 22 claim:

23 whether Defendant's facially neutral  
 24 policies and practices have a disparate  
 25 impact on class members, and whether those  
 26 practices are nonetheless justified by  
 27 business necessity, are similarly  
 28 issues best addressed with respect to  
 the entire class. . . . Adjudicating these  
 issues on a classwide basis is necessary before  
 any individualized proceeding can occur.

Id. (citations and footnote omitted). Adopting that  
 rationale, the court finds that the common questions regarding  
 liability as to the pay claim are "a significant aspect of

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plaintiff seeks individual relief such as  
 reinstatement or backpay after establishing a pattern  
 or practice of discrimination, a district court  
 must usually conduct additional proceedings . . .  
 to determine the scope of individual relief. . . .  
 At this phase, the burden of proof will shift to the  
 company, but it will have the right to raise any  
 individual affirmative defenses it may have, and to  
 demonstrate that the individual applicant was  
 denied an employment opportunity for lawful reasons. . . .

Ellis II, 285 F.R.D. at 505 (quoting Dukes, 131 S.Ct. at 2552 n. 7)  
 (internal quotations and citations omitted).

1 th[is] case and they can be resolved for all members of the  
2 class in a single adjudication[.]” See Mazza, 666 F.3d at 589  
3 (internal quotation marks and citations omitted).

4 Before addressing superiority, the court also must  
5 consider whether plaintiffs’ damages can be determined on a  
6 classwide basis. See Comcast, 133 S.Ct. at 1432 (“the proper  
7 standard for evaluating certification” requires a showing  
8 “that damages are capable of measurement on a classwide  
9 basis[.]”). In Comcast, an antitrust action, the district  
10 court accepted one of plaintiffs’ four theories of antitrust  
11 impact, but rejected the other three theories. Despite that  
12 limitation, the plaintiffs relied on a regression model that  
13 “did not isolate damages resulting from any one theory of  
14 antitrust impact.” Comcast, 133 S.Ct. at 1431).

15 Both the district court and the Third Circuit declined to  
16 entertain the defense argument challenging plaintiffs’  
17 regression model because “those arguments would also be  
18 pertinent to the merits determination[.]” Id. at 1433.  
19 Finding “[t]hat reasoning to flatly contradict[.]” prior  
20 Supreme Court precedent, and Dukes in particular, the Court  
21 reversed the class certification order. Id. (citation  
22 omitted). In reversing, the Comcast Court chastised the Third  
23 Circuit for “simply conclud[ing] that respondents provided a  
24 method to measure and quantify damages on a classwide basis,”  
25 without deciding whether the methodology [was] a just and  
26 reasonable inference or speculative.” Id. (internal quotation  
27 marks and citation omitted)

28 In the present case, unlike Comcast, plaintiffs’

1 methodology (although not fully developed<sup>39</sup>) for calculating  
2 back pay demonstrates that such damages are "capable of  
3 measurement on a classwide basis. See Comcast, 133 S.Ct. at  
4 1433. "Here, unlike *Comcast*, if putative class members prove  
5 [Bashas'] liability, damages will be calculated based on the  
6 wages each employee lost due to [Bashas'] unlawful practices."  
7 See Leyva, 2013 WL 2306567, at \*3. If Bashas' is found  
8 liable, it strikes the court, as the plaintiffs urge, that the  
9 back pay determination "is a purely mechanical process[.]"  
10 Pls.' Supp. Br. (Doc. 302) at 21:7. Furthermore, through a  
11 computer program, and relying upon "objective factors" such as  
12 "the individual employee payroll record (dates of employment  
13 job position, hours worked) and the wage scale," which is part  
14 of the record, the plaintiffs will be able to calculate back  
15 pay losses for "each eligible class member[.]" Id. at 21:15-  
16 18. Under this projected scenario, there is no concern, as  
17 there was in Comcast, that "[q]uestions of individual damages  
18 calculations will inevitably overwhelm questions common to the  
19 class[]". See Comcast, 133 S.Ct. at 1433. In addition, also  
20 in sharp contrast to Comcast, at least at this point,  
21 plaintiffs' methodology for calculating back pay correlates  
22 the "legal theory of the harmful event" with "the economic  
23 impact of that event. See id. at 1435 (internal quotation  
24 marks, emphasis and citation omitted). Having found

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25 <sup>39</sup> Plaintiffs "anticipate having an expert witness present" their  
26 backpay "analysis[.]" consisting of "a mathematical calculation conducted  
27 for each eligible class member to determine individual back pay losses."  
28 Pls.' Supp. Br. (Doc. 302) at 21:17-19 (emphasis in original). The court  
cannot fault plaintiffs for not having provided such an analysis in  
conjunction with their prior filings, as they did not have the benefit, nor  
could they have anticipated at that time, the Supreme Court's March 27,  
2013 Comcast decision.

1 predominance, it is necessary to consider superiority, the  
2 second Rule 23(b)(3) element.

### 3 2. Superiority

4 "[T]he purpose of the superiority requirement is to  
5 assure that the class action is the most efficient and  
6 effective means of resolving the controversy.'" Wolin v.  
7 Jaguar Land Rover North America, LLC, 617 F.3d 1168, 1175 (9<sup>th</sup>  
8 Cir. 2010) (quoting Wright & Miller, § 1779 at 174); see also  
9 Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9<sup>th</sup>  
10 Cir. 1996) (Superiority tests whether "class litigation of  
11 common issues will reduce litigation costs and promote greater  
12 efficiency.") "The superiority inquiry under Rule 23(b)(3)  
13 requires determination of whether the objectives of the  
14 particular class action procedure will be achieved in the  
15 particular case." Hanlon, 150 F.3d at 1023 (citation  
16 omitted). In turn, that inquiry "necessarily involves a  
17 comparative evaluation of alternative mechanisms of dispute  
18 resolution." Id. The Ninth Circuit recognizes that  
19 "[d]istrict courts are in the best position to consider the  
20 most fair and efficient procedure for conducting any given  
21 litigation, . . . , and so must be given wide discretion to  
22 evaluate superiority[.]" Bateman, 623 F.3d at 712 (internal  
23 quotation marks and citations omitted).

24 Plaintiffs offer two reasons as to why "[c]lass  
25 treatment is clearly the superior method for adjudicating the  
26 pay claims." Pls.' Supp. (Doc. 302) at 22:20. First, class  
27 certification would be less costly and more efficient.  
28 Second, most of the putative class members "lack the

1 resources" to fund this litigation, and so would be "deterred  
2 or prevented" from pursuing their discrimination claims. Id.  
3 at 22:25-26.

4 Conversely, Bashas' asserts that plaintiffs have not  
5 shown superiority because, first of all, there are only a  
6 "limited number of allegedly affected named plaintiffs and  
7 class members[.]" Def.'s Supp. Br. (Doc. 301) at 20:11-12.  
8 Supposedly, superiority also cannot be shown because putative  
9 class members "retain[] a strong incentive to bring their  
10 claims individually[.]" Id. at 20:13-14. Finally, harkening  
11 back to its familiar refrain that this lawsuit involves  
12 "thousands of highly-individualized factual inquiries[,]"  
13 Bashas' contends that is another reason why Rule 23(b)(3)  
14 certification is "inappropriate." Id. at 20:18-19.

15 Class action in accordance with Rule 23(b)(3) is the  
16 superior method of adjudicating plaintiffs' claims, despite  
17 what Bashas' argues. Without class certification, as  
18 plaintiffs accurately point out, each individual employee will  
19 have to separately "prove . . . that [Bashas'] maintained a  
20 two-tiered wage policy, that the policy . . .  
21 disproportionately impacted Hispanic Food City employees,  
22 and/or that the policy constituted disparate treatment based  
23 upon national origin." Pls.' Supp. (Doc. 302) at 22:21-25.  
24 Plainly, "[i]t is far more efficient to litigate" these  
25 fundamental liability issues "on a classwide basis rather than  
26 in thousands of individual and overlapping lawsuits." See  
27 Wolin, 617 F.3d at 1176 (Rule 23(b)(3) class certification  
28 proper in an "automobile-wear" case alleging "single,

1 defective alignment geometry[]" where "issues common to all  
2 class members . . . can be litigated together[]"); see also  
3 Jordan v. Paul Financial, LLC, 285 F.R.D. 435, 467 (N.D.Cal.  
4 2012) (internal quotation marks and citation omitted) ("[A]  
5 single action would be superior to maintaining a multiplicity  
6 of individual actions involving similar legal and factual  
7 issues.") As the Ninth Circuit reasoned in Wolin, "[f]orcing  
8 individual[s] . . . to litigate their cases, particularly  
9 where common issues predominate for the proposed class, is an  
10 inferior method of adjudication." Wolin, 617 F.3d at 1176.

11 Further, in the present case, much like Wolin, "[p]roposed  
12 class members face the option of participating in this class  
13 action, or filing hundreds of individual lawsuits that could  
14 involve duplicating discovery and costs that [potentially]  
15 exceed the extent of proposed class members' individual  
16 injuries." See id. Avoiding that latter scenario is the  
17 precise reason for Rule 23(b)(3) class certification. See  
18 Amchem, 521 U.S. at 615, 117 S.Ct. 2231 (quoting Advisory  
19 Committee's Notes on Rule 23(b)(3)) (that Rule is intended "to  
20 cover cases 'in which a class action would achieve economies  
21 of time, effort, and expense, and promote . . . uniformity of  
22 decision as to persons similarly situated, without sacrificing  
23 procedural fairness or bringing about other undesirable  
24 results.'"); see also York, 2011 WL 8199987, at \*33 (citations  
25 omitted)("Typically, a class action is superior if the case  
26 presents a large volume of individual claims that could strain  
27 judicial resources if tried separately and if each potential  
28 plaintiff's recovery may not justify the cost of individual

1 litigation.") Indeed, the Ninth Circuit has consistently held  
2 that "[w]here recovery on an individual basis would be dwarfed  
3 by the cost of litigating on an individual basis, this factor  
4 weighs in favor of class certification." Wolin, 617 F.3d at  
5 1175 (citing Zinser, 253 F.3d at 1189; Hanlon, 150 F.3d at  
6 1023).

7 Neither the supposedly "limited number" of potential class  
8 members, or their assertedly "strong incentive" to  
9 individually pursue their claims persuades the court that Rule  
10 23(b)(3) is not the proper vehicle for plaintiffs to litigate  
11 their claims. See Def.'s Supp. Br. (Doc. 301) at 20:11; and at  
12 20:13. Bashas' initial argument against a finding of  
13 superiority is that there are a "limited number" of putative  
14 class members. Id. at 20:11. Bashas' failure to elucidate on  
15 that point is troubling given its prior assertion that  
16 plaintiffs are "seek[ing] to certify a class of at least  
17 10,000[.]" Id. at 11:16. Moreover, that ten thousand figure  
18 hardly seems "limited," especially considering that it is  
19 based upon a "very modest assumption" of industry-wide  
20 "turnover rates[.]" Id. at 11:17-18. Bashas' cannot have it  
21 both ways; it cannot argue, in essence, that the class is too  
22 large for commonality purposes, but not for superiority.

23 Additionally, in holding that numerosity had been shown  
24 here, this court previously found, and Bashas' did not  
25 dispute, that the putative class has "thousands of members[.]"  
26 See Parra I, 2005 WL 6182338, at \*14 (citing Mot. (Doc. 159)  
27 at 18 [("Bashas' has employed between 3000 and 4440 Hispanic  
28 workers in hourly positions in the Food City stores in each



1 year since 2000.)"]]; Decl'n Drogin (Doc. 160) at Exhbt. 1.)  
 2 Hence, the number of potential class members does not render  
 3 Rule 23(b)(3) certification improper.

4 Likewise, the court is not convinced by Bashas'  
 5 "incentive" argument. Def.'s Supp. Br. (Doc. 301) at 20:13.  
 6 Bashas' postulates that plaintiffs have not shown superiority  
 7 because the putative class members "retain[] a strong  
 8 incentive to bring their claims individually," otherwise, they  
 9 "risk being precluded from asserting individual claims for  
 10 compensatory damages of up to \$300,000,<sup>40</sup> limited by the  
 11 applicable statutory cap, if they choose to 'tie their fates  
 12 to the class representatives.'" Id. at 20:13-17 (quoting  
 13 Dukes, 131 S.Ct. at 2559). Once again, Bashas' overlooks a  
 14 critical distinction between Dukes and the present case.

15 The concern in Dukes was that the strategy of including  
 16 only backpay claims "created the possibility . . . that  
 17 individual class members' compensatory-damages claims would be  
 18 *precluded* by litigation they had no power to hold themselves  
 19 apart from." Dukes, 131 S.Ct. at 2559 (emphasis in original).  
 20 The Court explained:

21 If it were determined, for example, that  
 22 a particular class member is not entitled  
 23 to backpay because her denial of increased  
 24 pay or a promotion was not the product  
 25 of discrimination, that employee might  
 26 be collaterally estopped from independently  
 seeking compensatory damages based on  
 that same denial. That possibility underscores  
 the need for plaintiffs with individual  
 monetary claims to decide *for themselves*

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27 <sup>40</sup> Section 1981a(b)(3) imposes a statutory limitation on, among  
 28 other types of damages, compensatory and punitive damages in Title VII  
 suits against employers with more than 500 employees. Hemmings v.  
Tidyman's Inc., 285 F.3d 1174, 1200 (9<sup>th</sup> Cir. 2002); 42 U.S.C.  
 § 1981a(b)(3)(D).

1           whether to tie their fates to the  
2           class representatives' or go it alone—a  
3           choice Rule 23(b)(2) does **not** ensure that they  
4           have.

5           Id. (italicized emphasis in original) (bold emphasis added).  
6           Those concerns are absent here. Unlike a Rule 23(b)(2) class,  
7           which is mandatory, a Rule 23(b)(3) class contains an opt-out  
8           provision. See Fed.R.Civ.P. 23(c)(2)(B)(v). That latter Rule  
9           is the sole basis for certifying plaintiffs' pay claim.  
10          Therefore, as a result of Rule 23(b)(3)'s opt-out mechanism,  
11          there is no risk, as there was in Dukes, where certification  
12          was sought pursuant to Rule 23(b)(2), of depriving a putative  
13          class member in this case of the opportunity of proceeding  
14          with his or her own individual monetary claims.

15          Lastly, Bashas' argument that a class action is not a  
16          superior method of adjudicating the pay claims because it  
17          "would require thousands of highly-individualized factual  
18          inquiries," rings hollow given the nature of those claims and  
19          the relief sought, as previously discussed. See Def.'s Supp.  
20          Br. (Doc. 301) at 20:18-19. Consequently, for the reasons  
21          just discussed, the court finds that certification of a class  
22          pursuant to Fed.R.Civ.P. 23(b)(3) with respect to plaintiffs'  
23          pay claim satisfies the most fundamental test for superiority  
24          -- "maintenance of this litigation as a class action is  
25          efficient and . . . it is fair." See Wolin, 617 F.3d at 1175-  
26          76.

27           **C. Fed.R.Civ.P. 23(b)(3)(A)-(D)**

28          An examination of predominance and superiority involves  
additional considerations. "In evaluating predominance and

superiority, the Court *must* consider: (1) the extent and nature of any pending litigation commenced by or against the class involving the same issues; (2) the interest of individuals within the class in controlling their own litigation; (3) the convenience and desirability of concentrating the litigation in a particular forum; and (4) the manageability of the class action."<sup>41</sup> Beck-Ellman v. Kaz USA, Inc., 283 F.R.D. 558, 567 (S.D.Cal. 2012)(citing Fed.R.Civ.P. 23(b)(3)(A)-(D); Amchem, 521 U.S. at 615-16, 117 S.Ct. 2231)) (emphasis added). These factors "require[] the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis.'" Zinser, 253 F.3d at 1190 (quoting 7A Wright & Miller, § 1780 at 562). The application of four enumerated factors, which the parties largely ignored,

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<sup>41</sup> The Ninth Circuit in Bateman, was confronted with the issue of whether Rule 23(b) "authorizes a court to consider whether certifying a class would result in disproportionate damages." Bateman, 623 F.3d at 713. Because Rule 23(b)(3) "provide[d] little, if any guidance, on" that issue, the Court recognized the propriety of expanding the inquiry thereunder to include factors not listed in Rule 23(b)(3)(A)-(D):

Superiority must be looked at from the point of view (1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large and (6) of the defendant. The listing is not necessarily in order of importance of the respective interests. Superiority must also be looked at from the point of view of the issues.

Id. (quotation marks and citations omitted). Here, there is no need for the court to delve into those non-listed factors because, first of all, a consideration of those factors is discretionary, not mandatory. See id. (emphasis added) ("A court *may* consider, other, non-listed factors[]" in deciding whether to certify a class under Rule 23(b)(3).) Second, in contrast to Bateman, the listed Rule 23(b)(3) factors encompass the concerns relevant here to class certification thereunder.

1 buttresses the finding that Rule 23(b)(3)'s predominance and  
2 superiority requirements are met here.

3 The first factor considers the interest of each member in  
4 "individually controlling the prosecution or defense of  
5 separate actions[.]" Fed.R.Civ.P. 23(b)(3)(A). Given the  
6 "common questions affecting the class as a whole at the  
7 liability stages of this matter, and given [the putative]  
8 class members' ability to opt out [,]" the putative class  
9 members in the present case "have a diminished interest in  
10 individually controlling the common portions of this action."  
11 See Ellis II, 285 F.R.D. at 539-540.

12 Further, "[w]here damages suffered by each putative class  
13 member are not large, this factor weighs in favor of  
14 certifying a class action." Zinser, 253 F.3d at 1190  
15 (citation omitted). That is because the policy "at the very  
16 core of the class action mechanism is to overcome the problem  
17 that small recoveries do not provide the incentive" for  
18 individuals to bring claims. Amchem Prods., 521 U.S. at 617.  
19 Here, the FAC does not allege the specific amount of damages  
20 sought, and the plaintiffs have given no indication as to  
21 whether those damages are sizeable or not. In Parra II, the  
22 Ninth Circuit estimated that the "hourly disparities  
23 translate[d] to annual salary differences of around \$300 per  
24 year to almost \$6,000 per year." See Parra II, 536 F.3d at  
25 977. Recoveries in that range are relatively modest. For  
26 both of these reasons, the first factor weighs in favor of  
27 class certification.

28 The second factor is "the extent and nature of any

1 litigation concerning the controversy already begun by or  
2 against class members[.]” Fed.R.Civ.P. 23(b)(3)(B).  
3 Arguably, E.E.O.C. v. Bashas’, Inc., No. CIV 09-0209 PHX RCB,  
4 wherein the EEOC is seeking to enforce an administrative  
5 subpoena against Bashas’, fits the definition of such  
6 litigation. The EEOC’s subpoena, the enforcement of which  
7 Bashas’ has vigorously challenged, is “part of the EEOC’s  
8 “ongoing investigation into whether Bashas’ has engaged in  
9 discrimination against its Hispanic employees on the basis of  
10 national origin with respect to wages and promotions.”  
11 E.E.O.C. v. Bashas’, Inc., 828 F.Supp.2d 1056, 1059 (D.Ariz.  
12 2011) (internal quotation marks and citation omitted).

13 The parties are fully aware of that action as they have  
14 participated either directly or indirectly in that litigation.

15 For now, the details are not important; suffice it to say  
16 that that case is pending in the Ninth Circuit Court of  
17 Appeals. Given that Bashas’ EEOC action is in its relative  
18 infancy, and the court would have to speculate as to how that  
19 action might, at some future date, impact the present case, it  
20 finds that the second factor also weighs in favor of class  
21 certification.

22 The third factor, “the desirability or undesirability of  
23 concentrating the litigation of the claims in the particular  
24 forum[,]” also augurs in favor of class certification. See  
25 Fed.R.Civ.P. 23(b)(3)(C). “Here, there is no reason to believe  
26 that concentrating this action in this Court is undesirable,”  
27 especially because “the proposed []class is composed of only  
28 [Arizona] . . . employees.” See York, 2011 WL 8199987, at

1 \*33.

2 The fourth and final factor considers "the likely  
3 difficulties in managing a class action." Fed.R.Civ.P.  
4 23(b)(3)(D). This factor looks to whether "the complexities  
5 of class action treatment outweigh the benefits of considering  
6 common issues in one trial[.]" Zinser, 253 F.3d at 1192  
7 (citations omitted). If they do, "class action treatment is  
8 not the superior method of adjudication." Id. (internal  
9 quotation marks and citations omitted). This balancing test  
10 "encompasses the whole range of practical problems that may  
11 render the class format inappropriate for a particular suit."  
12 Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 164, 94 S.Ct.  
13 2140, 40 L.Ed.2d 732 (1974).

14 At this juncture, and without the parties' input, it is  
15 difficult to conceive how the complexities of class  
16 certification here would outweigh the benefits. Cf. In re:  
17 Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 140  
18 (2<sup>nd</sup> Cir. 2001) (Sotomayor, J.) ("[F]ailure to certify an  
19 action under Rule 23(b)(3) on the sole ground that it would be  
20 unmanageable is disfavored, and should be the exception rather  
21 than the rule.") The court thus finds that this factor, too,  
22 favors class certification pursuant to Rule 23(b)(3). If at  
23 some point the pay claim does become unmanageable as a class  
24 action, which the court does not anticipate, the court  
25 "retains the flexibility to address problems with a certified  
26 class as they arise, including the ability to decertify."  
27 United Steel Workers, 593 F.3d at 807.

28 Overall, based upon the foregoing, the court finds that

1 the named plaintiffs' pay claim is properly certified pursuant  
 2 to Rule 23(b)(3). The court's analysis does not end here,  
 3 however, because although it previously certified plaintiffs'  
 4 working condition claim, the propriety of that certification  
 5 has become an issue after Dukes.

## 6 **II. Working Conditions Claim**<sup>42</sup>

7 Rule 23(b)(2) provides in relevant part that if the  
 8 elements of Rule 23(a) are met, and if "the party opposing the  
 9 class has acted or refused to act on grounds that apply  
 10 generally to the class, so that final injunctive relief or  
 11 corresponding declaratory relief is appropriate respecting the  
 12 class as a whole[,] [a] class may be maintained[.]" Fed. R.  
 13 Civ. P. 23(b)(2). Pursuant to that Rule, in Parra I, this  
 14 court certified a class as to working conditions comprised of:

15 All Hispanic workers employed by defendant in  
 16 an hourly position at any Food City retail store  
 17 since April 4, 1998, who have been or may be subject  
 to the challenged disparate working conditions.

18 Parra I, 2005 WL 6182338, at \*22. Bashas' appealed only the  
 19 denial of class certification as to the pay claim, leaving  
 20 undisturbed the certification of the working conditions claim.

### 21 **A. Decertification**

22 Now, based upon Dukes' "newly clarified commonality  
 23

---

24 <sup>42</sup> Plaintiffs imply that Bashas' disregarded this court's order by  
 25 addressing the working conditions claim in its supplemental briefs. While  
 26 setting the post-Dukes briefing schedule, however, Bashas' explicitly  
 27 inquired as to the propriety of "rais[ing] the issue of reconsideration of  
 28 [this court's prior] certification of [the] store conditions" claim, or  
 whether the court wanted that issue addressed separately. Tr. (June 27,  
 2011) at 10:42:09 a.m. - 10:42:16 a.m. The court responded that it would  
 not "preclude" Bashas' from raising that claim in the supplemental briefs.  
 Tr. (June 27, 2011) at 10:42:26 - 10:42: 26 a.m. Consequently, the issue  
 of the continued certification of the working conditions claim is properly  
 before the court.

1 standard," Def.'s Resp. (Doc. 304) at 6:1-2, Bashas' "requests  
2 that the Court reconsider . . . and deny" class certification  
3 of the working conditions claim. Def.'s Supp. Br. (Doc. 301)  
4 at 20:22-23. Bashas' response more accurately requests "de-  
5 certif[ication]" of the working conditions claim, however, as  
6 will soon become evident. Def.'s Resp. (Doc. 304) at 8:20  
7 (emphasis added).

8 Interpreting Bashas' request as strictly one for  
9 reconsideration, plaintiffs argue that it is "untimely[.]"  
10 Pls.' Reply (Doc. 303) at 10:10. There are two prongs to this  
11 argument. Neither is meritorious. First, plaintiffs note  
12 that Bashas' did not appeal class certification of the working  
13 conditions claim pursuant to Fed.R.Civ.P. 23(f). That Rule  
14 allows a party, within 14 days after entry of the class  
15 certification order, to file with the court of appeals a  
16 petition for permission to appeal the granting or denying of  
17 class certification. The filing of a Rule 26(f) petition is  
18 separate and distinct from filing a reconsideration or  
19 decertification motion, however. Therefore, although Bashas'  
20 did not avail itself of Rule 23(f), it does not follow, as  
21 plaintiffs' so strongly imply, that Bashas' current request is  
22 untimely.

23 Second, plaintiffs baldly assert that Bashas' "did not  
24 . . . timely" move "for reconsideration[.]" Id. at 10:7. Even  
25 if the court were to agree,<sup>43</sup> it would not preclude Bashas'

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26  
27 <sup>43</sup> LRCiv 7.2(g)(2) provides that "[a]bsent good cause shown, any  
28 motion for reconsideration shall be filed no later than fourteen (14) days  
after the date of the filing of the Order that is the subject of the  
motion." LRCiv 7.2(g)(2). Bashas' did not seek reconsideration within 14  
days after the filing of Parra I, and evidently that is the basis for  
plaintiffs' untimeliness argument. Of course, such an argument presumes



1 from requesting decertification now. Bashas' request is  
 2 timely given the considerable latitude a district court has to  
 3 revisit the class certification issue. "A district court may  
 4 decertify a class at any time." Rodriguez v. West Publ'g  
 5 Corp., 563 F.3d 948, 966 (9<sup>th</sup> Cir. 2009)(emphasis added)  
 6 (citing Falcon, 457 U.S. at 160, 102 S.Ct. 2364) Federal Rule  
 7 of Civil Procedure 23(c)(1)(C) embodies that latitude: "An  
 8 order that grants or denies class certification may be altered  
 9 or amended before final judgment." Fed.R.Civ.P. 23(c)(1)(C).  
 10 Such an order is, therefore, "inherently tentative." Coopers &  
 11 Lybrand v. Livesay, 437 U.S. 463, 469 n. 11, 98 S.Ct. 2454, 57  
 12 L.Ed.2d 351 (1978). Thus, "[a] district court retains the  
 13 flexibility to address problems with a certified class as they  
 14 arise, including the ability to decertify." United Steel  
 15 Workers, 593 F.3d at 809 (emphasis added).

16 This flexibility extends "[e]ven after a certification  
 17 order is entered[.]" Id. (quoting Falcon, 457 U.S. at 160,  
 18 102 S.Ct. 2364) (other citations omitted). Thus, "Rule 23  
 19 provides district courts with *broad authority at various*  
 20 *stages in the litigation* to revisit class certification  
 21 determinations and to redefine or decertify classes as  
 22 appropriate." Wang, 709 F.3d at 836 (citing Armstrong v.  
 23 Davis, 275 F.3d 849, 871 n. 28 (9<sup>th</sup> Cir. 2001), *abrogated on*  
 24 *other grounds by Johnson v. California*, 543 U.S. 499, 504-05,

25  
 26 the absence of "good cause." In all likelihood, such a presumption is not  
 27 warranted here, however, because Dukes was decided more than five years  
 28 after Parra I. And, LRCiv 7.2(g)(1) allows for the possibility of  
 reconsideration, *inter alia*, based upon a showing of "new . . . legal  
 authority that could not have been brought to [the court's] attention  
 earlier." So even if the court were to treat Bashas' motion as one for  
 reconsideration, a strong argument could be made that it is untimely.

1 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005)) (emphasis added).  
2 Indeed, somewhat presciently, relying upon Armstrong, Parra I  
3 recognized that flexibility. See Parra I, 2005 WL 6182338, at  
4 \*14. The passage of time, therefore, is not a barrier to  
5 Bashas' request for decertification of the working conditions  
6 class, post-Dukes, as the foregoing shows.

7 The parties fundamentally disagree as to whether Dukes  
8 affects certification of that class. Plaintiffs argue that  
9 Dukes "has no impact[,] Pls.' Supp. Brief (Doc. 302) at 24:28,  
10 whereas Bashas' contends that plaintiffs should not be allowed  
11 to "maintain" their working conditions claim because  
12 commonality, as articulated in Dukes, is missing here.  
13 Def.'s Supp. Br. (Doc. 301) at 15:22.

#### 14 **B. Standing**

15 The court is not at liberty to address that conflict  
16 without resolving the prefatory issue of standing, although  
17 the parties did not. See Pier 1 Imports (U.S.) Inc., 631 F.3d  
18 939, 954 (9<sup>th</sup> Cir. 2011) (internal quotation marks and  
19 citations omitted) ("[F]ederal courts are required *sua sponte*  
20 to examine jurisdictional issues such as standing.") "Mindful  
21 that 'Rule 23's requirements must be interpreted in keeping  
22 with Article III constraints[]'" the court must determine  
23 whether named plaintiffs, Estrada and Martinez have standing  
24 to bring the working conditions claim. See Evans v. Linden  
25 Research, Inc., 2012 WL 5877579, at \*6 (N.D.Cal. Nov. 20,  
26 2012) (quoting Amchem, 521 U.S. at 613, 117 S.Ct. 2231); and  
27 In re Abbott Labs. Norvir Antitrust Litig., 2007 WL 1689899,  
28 at \*2 (N.D.Cal. June 11, 2007) ("[I]t is 'well-settled that

1 prior to the certification of a class, and technically  
 2 speaking before undertaking any formal typicality or  
 3 commonality review, the district court must determine that at  
 4 least one named class representative has Article III standing  
 5 to raise each class subclaim.'") (quoting Wooden v. Bd. of  
 6 Regents of Univ. Sys. of Georgia, 247 F.3d 1262, 1287-88 (11<sup>th</sup>  
 7 Cir. 2001)).

8 Standing is an issue because, as plaintiffs stress, they  
 9 are seeking "*only injunctive relief*" in connection with their  
 10 working conditions claim, Pls.' Supp. Br. (Doc. 302) at 25:20  
 11 (emphasis in original); but, plaintiff Estrada, as a former  
 12 Food City employee,<sup>44</sup> lacks standing to sue for injunctive  
 13 relief against his former employer. See Walsh v. Nevada Dept.  
 14 of Human Resources, 471 F.3d 1033, 1036, 1037 (9<sup>th</sup> Cir. 2006)  
 15 (former employee, who gave no indication in the complaint that  
 16 she was interested in returning to work for her former  
 17 employer, did not have standing to request injunctive relief  
 18 to force that former employer to "adopt and enforce lawful  
 19 policies regarding discrimination based on disability[]"); see  
 20 also Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1045 (9<sup>th</sup>  
 21 Cir. 1999) ("Unless the named plaintiffs are themselves

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22  
 23 <sup>44</sup> There is a discrepancy between the FAC and plaintiff Estrada's  
 24 declaration in support of class certification in terms of his employment  
 25 status. The FAC, filed March 11, 2004, alleges that plaintiff Estrada "is  
 26 employed by . . . Bashas' at a Food City Store." FAC (Doc. 116) at 3:4-5,  
 27 ¶ 7 (emphasis added). Estrada's declaration filed September 27, 2004,  
 28 explicitly declares, however, that he "worked at the Food City store . . .  
 from April 1999 until July 2002." Estrada Decl'n (Doc. 176) at 1:23-24,  
 ¶ 1 (emphasis added). Given that unequivocal declaration, presumably the  
 FAC inadvertently alleges that Mr. Estrada was employed at a Food City  
 store in March, 2004. Thus, especially given that in Parra I this court  
 relied upon that declaration for Estrada's employment status, and that  
 finding has never been challenged, the court will continue to treat him as  
 a former Food City employee. See Parra I, 2005 WL 6182338, at \*17.

entitled to seek injunctive relief, they may not represent a class seeking that relief." ).

Plaintiff Estrada's lack of standing does not foreclose plaintiffs from pursuing their working conditions claim, so long as plaintiff Martinez has standing. See Stearns, 655 F.3d at 1021 (internal quotation marks and citations omitted) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements."); see also Ellis I, 657 F.3d at 979 ("Because only one named Plaintiff must meet the standing requirements, the district court did not err in finding that Plaintiffs have standing.") Again presuming that she still is a Food City hourly employee, plaintiff Martinez has standing to represent the Rule 23(b)(2) injunctive relief class as to working conditions. See Ellis I, 657 F.3d at 987 ("[O]nly current employees have standing to seek injunctive relief." Ellis I, 657 F.3d at 988 (citing Dukes, 131 S.Ct. at 2559-60)).<sup>45</sup>

### **C. Governing Legal Standards**

Having found that one named plaintiff - Aurelia Martinez - has standing as to the working conditions claim, the court can now turn to the issue of possible decertification of that claim

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<sup>45</sup> In contrast to standing, Title VII exhaustion is a pre-condition to bringing suit, and not jurisdictional. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (although Title VII requires that plaintiffs timely exhaust administrative remedies, "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling[ ]"). For that reason, and because the parties did not raise the issue of exhaustion with respect to the working conditions claim, the court declines to address it *sua sponte*. See Mounts v. California, 2009 WL 1084214, at \*4 (E.D.Cal. April 22, 2009) ("The court is unaware of any authority that suggests that it has a *sua sponte* duty to address the issue of failure to plead exhaustion of administrative remedies.")

1 post-Dukes. Decertification "is committed to the sound  
2 discretion of the district court." West World Travel, Inc. v.  
3 AMR Corp., 2005 WL 6523266, at \*3 (C.D.Cal. Feb. 24, 2005)  
4 (citation omitted), aff'd in part and rev'd in part on  
5 different grounds, 265 Fed. Appx. 472 (9<sup>th</sup> Cir. 2008). "[A]  
6 district court reevaluating the basis for certification may  
7 consider its previous substantive rulings in the context of the  
8 history of the case, and may consider the nature and range of  
9 proof necessary to establish the class-wide allegations." Cruz  
10 v. Dollar Tree Stores, Inc., 2011 WL 2682967, at \*3 (N.D.Cal.  
11 July 8, 2011) (internal quotation marks and citation omitted).  
12 Likewise, "district courts retain the authority to amend or  
13 decertify a class if, based on information not available or  
14 circumstances not anticipated when the class was certified, the  
15 court finds that either is warranted." Dukes II, 603 F.3d at  
16 580 n. 4, rev'd on other grounds, Dukes, 131 S.Ct. 2541).  
17 Thus, "[e]ven after a certification order is entered, the  
18 judge remains free to modify it in the light of subsequent  
19 developments in the litigation[,]'" United Steel Workers, 593  
20 F.3d at 809 (quoting Falcon, 457 U.S. at 160) (other citations  
21 omitted), including "changes in the law that make it no longer  
22 proper for a class to be maintained." Estrella, 2012 WL  
23 214856, at \*5 (internal quotation marks and citations omitted);  
24 see also Brady v. Deloitte & Touche LLP, 2012 WL 1059694, at  
25 \*4-\*8 (granting motion to decertify a class because the  
26 plaintiffs did "not show[] that the requirements of Rule  
27 23(b)(3) [we]re met[]" after intervening Ninth Circuit and  
28 Dukes decisions).

1        "In considering the appropriateness of decertification,  
 2 the standard of review is the same as a motion for class  
 3 certification: whether the Rule 23 requirements are met."  
 4 Brady, 2012 WL 1059694, at \*5 (N.D.Cal. March 27, 2012)  
 5 (citation omitted). In Marlo v. United Parcel Serv., Inc.,  
 6 639 F.3d 942 (9<sup>th</sup> Cir. 2011), the Ninth Circuit found that on  
 7 defendant's decertification motion "[t]he district court . . .  
 8 properly placed the burden on [the plaintiff] to demonstrate  
 9 that Rule 23's class-certification requirements had been met."  
 10 Id. at 947-948. Thus, in contrast to the standard motion  
 11 procedure where "the proponent of a motion bears the initial  
 12 burden of showing that the motion should be granted, the Ninth  
 13 Circuit rule is that the party resisting the motion bears the  
 14 burden of showing that the motion should not be granted."  
 15 Campbell v. PricewaterhouseCoopers, LLP, 287 F.R.D. 615, 619  
 16 (E.D.Cal. 2012) (citing Marlo., 639 F.3d at 947.<sup>46</sup> That means  
 17 that here, the plaintiffs retain the burden of "showing that  
 18 class certification is still warranted[.]" Id.

19        As previously discussed, this court, along with many  
 20 others, is of the view that the Supreme Court's Dukes decision

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21  
 22        <sup>46</sup> Pre-Marlo, courts had held "that a party seeking decertification  
 23 of a class should bear the burden of demonstrating that the elements of  
 24 Rule 23 have not been established." See, e.g., Slaven v. BP America,  
Inc., 190 F.R.D. 649, 651 (C.D.Cal. 2000) (emphasis in original); Gonzales  
v. Arrow Fin. Servs. LLC, 489 F.Supp.2d 1140, 1153 (S.D.Cal. 2007). Even  
 25 post-Marlo, some courts have continued to allocate the burden in that way.  
 26 See, e.g., Dalton v. Lee Publications, Inc., 2013 WL 2181219, at \*3  
 27 (S.D.Cal. May 20, 2013) (citations omitted); Cole v. CRST, Inc., 2012 WL  
 28 4479237, at \*3 (C.D.Cal. Sept. 27, 2012); Estrella v. Freedom Financial  
Network, LLC, 2012 WL 214856, at \*4 (N.D.Cal. Jan. 24, 2012). Given the  
 Ninth Circuit's unequivocal holding in Marlo, however, this court agrees  
 that to the extent courts have found that on a motion to decertify, it is  
 the defendant's burden to "demonstrat[e] that the elements of Rule 23 have  
 not been established[,] . . . these cases are no longer good law." Negrete  
v. Allianz Life Ins. Co. of N.Am., 287 F.R.D. 590, 598 n. 1 (S.D.Cal. 2012)  
 (internal quotation marks and citation omitted).

1 changed the legal landscape with respect to Rule 23(a)(2)'s  
2 commonality requirement. That change, which could not have  
3 been anticipated when the working conditions class was  
4 certified in 2005, is more than ample justification for  
5 considering whether the working conditions class still can be  
6 maintained in light of Dukes.

7 **D. Commonality**

8 Plaintiffs assert that "certification of the working  
9 conditions claim remains proper[]" because in Parra I this  
10 court "identified a discriminatory practice[,]" which "meets  
11 the standards for Rule 23(a) commonality." Pls.' Supp. Br.  
12 (Doc. 302) at 25:16-17. Disagreeing Bashas' asserts that  
13 plaintiffs have failed to "identify a specific policy or  
14 practice[,]" much less one that "could have caused [the]  
15 challenged working conditions. Def.'s Supp. Br. (Doc. 301) at  
16 14:21-22; and Def.'s Resp. (Doc. 304) at 5:16 (emphasis in  
17 original).

18 The sole legal basis for plaintiffs' argument that they  
19 have identified a discriminatory practice is the following  
20 excerpt from Parra I:

21 [P]laintiffs claim that [Bashas'] acted in  
22 a discriminatory manner by maintaining  
23 disparate working conditions in their stores.  
24 Unlike the numerous claims of discrimination  
25 articulated by the plaintiffs in *Monreal*,  
26 **Plaintiffs here allege one main claim**  
27 **of a discriminatory practice or policy.**  
28 Although the facts of each individual complaint  
may differ according to where and in what  
position the class member worked, viewed  
together they form a general claim that  
[Bashas'] holds a discriminatory policy or  
practice in relation to working conditions  
offered in its Food City stores.

Id. at 25:7-8 (quoting Parra I, 2005 WL 6182338, at \*20



(emphasis added by plaintiffs); see also Pls.' Reply (Doc. 303) at 9:24 (same). Significantly, plaintiffs do not attempt to explain how the quoted rationale applies to the issue of Rule 23(a)(2) commonality, especially after Dukes. Likewise, Bashas' response did not address plaintiffs' reliance upon this aspect of Parra I.

In any event, plaintiffs are disregarding the context of the quoted rationale. At that point in Parra I, the issue was not Rule 23(a)(2) commonality,<sup>47</sup> as it is now. Instead, the issue was the certifiability of the working conditions claim pursuant to Rule 23(b)(2).<sup>48</sup> That Rule focuses on the relief sought, and more particularly, the availability of injunctive or declaratory relief to the class as a whole. "The key to the (b)(2) class is the *indivisible nature of the injunctive or declaratory remedy* warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Dukes, 131 S.Ct. at 2557 (internal quotation marks and citation omitted) (emphasis added). It strikes the court, however, that indivisibility of the relief sought is a separate issue from whether plaintiffs' working conditions claim satisfies Rule

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<sup>47</sup> Tellingly, despite the explicit finding in Parra I that "on the issue of working conditions, the proposed class shares sufficient commonality to satisfy the minimal requirements of Rule 23(a)(2)[,]" plaintiffs did not even mention, much less rely upon, that finding to establish commonality after Dukes. See Parra I, 2005 WL 6182338, at \*16. The court is compelled to agree with plaintiffs' concession, albeit implicit, that the Parra I commonality finding could not withstand scrutiny in light of Dukes.

<sup>48</sup> Seeming to recognize that distinction, plaintiffs' reply argues that "this court properly certified the working conditions claim *under Rule 23(b)(2)[,]*" Pls.' Reply (Doc. 303) at 6:18 (emphasis omitted) (italicized emphasis added). But again, that is not the issue now.



23(a)(2)'s commonality requirement, particularly in the wake of Dukes.

To be sure, "it is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole." Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9<sup>th</sup> Cir. 2010) (internal quotation marks and citations omitted). By the same token, however, plaintiffs did not offer any legal support, and research did not reveal any, to support the view that just because Rule 23(b)(2) has been satisfied, so, too, has Rule 23(a)(2)'s commonality requirement. Therefore, the court is not convinced that its Rule 23(b)(2) rationale in Parra I, standing alone, supports a finding that plaintiffs have satisfied Dukes' commonality standards. Accordingly, plaintiffs have not met their burden of "affirmatively demonstrating" their compliance with Rule 23(a)(2), Dukes, 131 S.Ct. at 2551, and, concomitantly, that the working conditions class still should be certified.

There are two other deficits in plaintiffs' attempt to show commonality which are particularly noteworthy after Dukes, as Bashas' points out. The first is plaintiffs' failure to show that their working conditions claim "depend[s] upon a common contention . . . that is capable of classwide resolution[.]" See Dukes, 131 S.Ct. at 2551. Unlike plaintiffs' equal pay claim where, as discussed herein, "examination of all the putative class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*[" plaintiffs have not made a similar showing as to their working conditions claim. See

1 id. at 2552 (emphasis in original). In originally moving  
2 for class certification, plaintiffs did list a number of  
3 alleged common issues of law and fact. See Pls.' MCC (Doc.  
4 159) at 19:22-21:12. But, in contrast to their pay claim,  
5 plaintiffs have not explained how continued class  
6 certification of the working conditions claim has "the  
7 capacity . . . to generate common *answers* apt to drive the  
8 resolution of th[is] litigation." See Dukes, 131 S.Ct. at  
9 2551 (internal quotation marks and citation omitted)  
10 (emphasis in original).

11 That omission is intertwined with the second weakness in  
12 plaintiffs' commonality proof - the insufficiency of their  
13 anecdotal evidence. The Dukes Court held that "significant  
14 proof that Wal-Mart operated under a general policy of  
15 discrimination" was entirely absent; and hence, plaintiffs  
16 did not establish commonality. Dukes, 131 S.Ct. at 2553  
17 (internal quotation marks omitted). In Dukes, plaintiffs  
18 attempted to "identif[y] a common mode of exercising  
19 discretion that pervade[d] the entire company" by relying  
20 upon, *inter alia*, anecdotal evidence. Dukes, 131 S.Ct. at  
21 2555-56. There, the anecdotes amassed ("120 affidavits  
22 reporting experiences of discrimination - about 1 for every  
23 12,500 class members - relating to only 235 out of Wal-Mart's  
24 3,4000 stores") were relatively small given the class size  
25 (1.5 million). Further, although the plaintiffs alleged that  
26 Wal-Mart discriminated nation-wide, "more than half of the"  
27 anecdotes were "concentrated in only six States. . . ; half  
28 of all States ha[d] only one or two anecdotes; and 14 States

1 ha[d] no anecdotes about Wal-Mart's operations at all." Id.  
2 at 2556 (citation omitted). The Dukes Court thus held that  
3 "[e]ven if every single one of th[o]se accounts [wa]s true,  
4 that would not demonstrate that the entire company operate[s]  
5 under a general policy of discrimination, . . . which is what  
6 respondents must show to certify a companywide class." Id.  
7 (internal quotation marks, citation and footnote omitted).

8 The anecdotal evidence in the present case is similarly  
9 weak. In 2004, Food City had 58 stores. Def.'s exh. 1  
10 (Proulx Aff.) at 3, ¶ 8. Yet, plaintiffs are relying upon  
11 only 11 declarations from putative class members, and two  
12 other declarations. Those declarations, from current and  
13 former Food City employees, describe purportedly substandard  
14 working conditions in at most nine of the 58, or 15.5%, of  
15 Food City stores. Moreover, four of those declarations  
16 pertain to Food City store 59 which is "now closed." Def.'s  
17 Supp. Br. (Doc. 301) at 6:25 (emphasis omitted). The thrust  
18 of those declarations is that Food City stores have issues  
19 with rodents, roaches, and poorly maintained equipment and  
20 work areas. As in Dukes, however, even assuming the  
21 veracity of all 13 of those accounts, "that would not  
22 demonstrate that [Bashas'] operate[s] under a general policy  
23 of discrimination" with respect to working conditions at its  
24 Food City stores. See Dukes, 131 S.Ct. at 2556 (internal  
25 quotation marks and citation omitted).

26 Besides the relatively few proffered declarations,  
27 evidence is lacking "that the *entire class* was subject to  
28 the same allegedly discriminatory practice[.]" Ellis I, 657

1 F.3d at 983 (emphasis added). Such evidence is lacking, in  
2 part, because the record includes more than 80  
3 countervailing declarations from Food City employees, many of  
4 them Hispanic, from at least 33 different stores. See  
5 generally Def.'s Resp. MCC (Doc. 190), exh. 50-135 thereto.  
6 This broader spectrum of proof readily shows that not all  
7 Food City stores are as plaintiffs depict through their few  
8 selective declarations.

9 This is not surprising given the acquisition history of  
10 the Food City stores. As delineated in the affidavit of  
11 Michael Proulx, Bashas' Executive Vice President and Chief  
12 Operating Officer, Def.'s Resp. MCC (Doc. 190), exh. 3  
13 thereto at 4:17-18, in the decade between 1994 and 2004,  
14 Bashas' rapidly "expanded[,] . . . , most notably in the Food  
15 City format[.]" Id., exh. 1 thereto (Proulx Aff.) at 2, ¶ 8.  
16 For example, in 1996, Bashas' acquired 16 Mega Foods stores,  
17 twelve of which eventually became Food City stores. Id. at  
18 4, ¶ 11. "Those stores were in vastly varying conditions."  
19 Id. at 4, ¶ 12. "Some . . . were relatively new and in good  
20 condition." Id. "Others were older stores that had  
21 significant facility issues." Id. That was also the  
22 situation when "[a]round 2001, Bashas' purchased some ABCO  
23 stores, some of which were converted to Bashas' stores and  
24 some of which were converted to Food City stores." Id. at 4,  
25 ¶ 14. "Again, these stores were in a variety of different  
26 conditions, ranging from being in good shape to needing much  
27 improvement." Id.

28 This acquisition history is significant because, *inter*

1 alia, it further demonstrates the lack of a common answer to  
2 the question of why was I disfavored as to working  
3 conditions. Plaintiffs' meager anecdotal evidence,  
4 especially when read in the context of the acquisition  
5 history of Food City stores, "is too weak to raise any  
6 inference that" the working conditions at all Food City  
7 stores were substandard because those stores employ a higher  
8 percentage of Hispanics than do A.J.'s and Bashas'. See  
9 Dukes, 131 S.Ct. at 2556. In short, plaintiffs have not,  
10 as they must post-Dukes, shown that "there was 'significant  
11 proof that [Bashas] operated under a general policy of  
12 discrimination[]'" with respect to working conditions that  
13 could "affect the class as a whole." Ellis I, 657 F.3d at  
14 983 (quoting Dukes, 131 S.Ct. at 2553. Accordingly,  
15 because it cannot survive Dukes, the court decertifies the  
16 working conditions class previously certified in Parra I.

17 In sum, for all of the reasons set forth herein, the  
18 court grants plaintiffs' motion for class certification as  
19 to the pay claim for monetary damages pursuant to  
20 Fed.R.Civ.P. 23(b)(3), on behalf of current and former  
21 employees. Named plaintiffs Gonzalo Estrada and Aurelia  
22 Martinez shall serve as the class representatives for that  
23 class. The court decertifies the working conditions class  
24 previously certified in Parra I, however.

25 **III. Rule 23(f)**

26 Presumably, Bashas' is continuing to "request[]" that  
27 upon class certification, this court "recommend the  
28 acceptance of a Rule 23(f) appeal." See Def.'s Resp. MCC

1 (Doc. 190) at 82:14 (emphasis added). That Rule states, in  
2 relevant part, that “[a] *court of appeals* may permit an  
3 appeal from an order granting or denying class-action  
4 certification under this rule if a petition for permission  
5 to appeal is filed with the *circuit clerk* within 14 days  
6 after the order is entered.” Fed.R.Civ.P. 23(f) (emphasis  
7 added). Given the unequivocal language of that Rule, this  
8 court disagrees with Bashas’ reading thereof. The authority  
9 to permit an appeal from an order denying or granting of  
10 class certification lies with the court of appeals – not  
11 with the district court. It is equally clear that Rule  
12 23(f) does not contemplate a recommendation of such an  
13 appeal, as Bashas’ urges. The court thus denies Bashas’  
14 request that this court recommend to the Ninth Circuit that  
15 it accept an immediate appeal of the class certification  
16 decision herein.

17 Relatedly, the court likewise presumes that Bashas’  
18 continues to seek a stay “pending Ninth Circuit action.”  
19 Def.’s Resp. MCC (Doc. 190) at 82:15. This court does  
20 retain jurisdiction to stay its own order pending appeal.  
21 See Fed.R.App.P. 8(a). However, Bashas’ has not explicitly  
22 moved for such relief, and has not addressed the four-factor  
23 balancing test which this Circuit applies in evaluating  
24 whether to issue a stay. See Leiva-Perez v. Holder, 640  
25 F.3d 962, 964 (9<sup>th</sup> Cir. 2011). Thus, to the extent Bashas’  
26 motion can be read as seeking a stay pending appeal, the  
27 court denies such relief.

28 . . .

**Conclusion**

Accordingly, the court hereby **ORDERS** that Plaintiffs' Motion for Class Certification (Doc. 159) is **GRANTED** to the extent they are seeking certification of a class with respect to pay pursuant to Fed.R.Civ.P. 23(b)(3). In that regard, the court certifies a class as follows:

All Hispanic workers currently and formerly employed by defendant Bashas' Inc. in an hourly position at any Food city retail store since April 4, 1998, who have been subject to the challenged pay policies and practices.

**IT IS FURTHER ORDERED** that the working conditions claim is **DECERTIFIED**; and

**IT IS FINALLY ORDERED** that in conformity with Fed.R.Civ. P. 23(c)(2)(B), within **thirty (30) days** of the date of entry of this order, the parties shall submit jointly an agreed upon form of notice, a joint proposal for dissemination of the notice, and the time-line for opting out of the action. Plaintiffs must bear the costs of the notice, which shall include mailing by first-class mail.

DATED this 31th day of May, 2013.



Robert C. Broomfield  
Senior United States District Judge

Copies to all counsel of record